

1-42

240750
V55Cf

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 482

**EDWARD SHELDON AND MARGARET AYER
BARNES; PETITIONERS,**

VS.

**METRO-GOLDWYN PICTURES CORPORATION,
METRO-GOLDWYN-MAYER DISTRIBUTING
CORPORATION, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 25, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

INDEX.

	PAGE
Statement Under Rule XIII	1
Bill of Complaint	3
Answer of Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation	4g
Answer of Defendants Loew's Inc. and Culver Export Corporation	4j
Interlocutory Decree	4l
Testimony Before Special Master	9
Letter from counsel (Pollak) to Special Master in relation to claim as to federal income taxes deductible from profits of theatre corporations in which Loew's Incorporated had an interest	760
Statement as to Exhibits	763
Report of Special Master	956
Defendants' Exceptions to Special Master's Report	1041
Defendant Metro-Goldwyn-Mayer Distributing Corporation's Waiver of Exception	1067
Complainants' Exceptions to Special Master's Report	1068
Complainants' Waiver of Exceptions	1083
Complainants' Additional Waiver of Exception	1085
Notice of Motion to Confirm Special Master's Report, etc.	1086
Affidavit of Milton M. Rosenbloom, Read in Support of Motion	1088
Affidavit of Arthur F. Driscoll, Read in Support of Motion	1091
Schedule as to Services Rendered	1099
Affidavit of Jesse T. Mills, Read in Opposition to Motion	1147
Reply Affidavit of Edward C. Raftery, Read in Support of Motion	1167
Affidavit of Jesse T. Mills	1177
Stipulation as to Federal Income Taxes of Defendants	1181
Additional Stipulation as to Federal Income Taxes	1185
Opinion of Leibell, D. J.	1186
Resettled Final Decree Appealed From	1212
Defendants' Petition for Appeal and Order Allowing Appeal	1218

Index (continued).

	PAGE
Defendants' Assignment of Errors	1220
Defendants' Citation	1247
Order and Consent re Record and Exhibits	1248
Complainants' Petition for Appeal and Order Allow ing Appeal	1250
Stipulation Waiving the Filing of Security for Costs	1251
Complainants' Assignments of Error	1252
Complainants' Citation	1256
Stipulation as to Record	1257
Clerk's Certificate	1258
Proceedings in U. S. C. C. A., Second Circuit	1259
Opinion, Hand, J.	1259
Petition for rehearing	1276
Orders denying petition for rehearing	1284
Judgment	1287
Clerk's certificate	1289
Opinion, Hand, J., in prior appeal on issue of infringement	1291
Order allowing certiorari	1308

DEPENDANTS' WITNESSES

George E. Berry:

Direct	10
Cross	11

William L. Engelhardt:

Direct	13
--------	----

Alfred De Oro, Jr.:

Direct	14
--------	----

Maurice Brunet:

Direct	19
Cross	29
Re-direct	32

Defendants' Witnesses (continued).

	PAGE
Jacques Van Stratten:	
Direct	32
Willard K. Craig:	
Direct	40
Cross	53
Re-direct	80
Re-cross	81
(Recalled)	
Re-direct	215
Re-cross	227
Re-re-direct	238
(Recalled)	
Re-direct	286
Re-cross	289
Charles Chic:	
Direct	83
Cross	91
Re-direct	91
Fred Gabourie:	
Direct	92
Nathalie Bucknall:	
Direct	98
Cross	107
Re-direct	108
Cedric Gibbons:	
Direct	109
Nat W. Finston:	
Direct	112
Lawrence Keethe:	
Direct	115
Daniel Gray:	
Direct	118

Defendants' Witnesses (continued).

	PAGE
Marcella Napp:	
Direct	124
Edith Louise Farrell:	
Direct	132
Floyd L. Hendrickson:	
Direct	134
Louis F. Kolb:	
Direct	136
Cross	141
William Walker Spencer:	
Direct	142
Wayland P. Hendry:	
Direct	144
Louis B. Mayer:	
Direct	146
Cross	171
Re-direct	171
Howard Strickling:	
Direct	173
H. F. Metcalf:	
Direct	180
Cross	184
Eli Benneche:	
Direct	185
John R. Arnold:	
Direct	189
John M. Nickolaus:	
Direct	193
Douglas Graham Shearer:	
Direct	201

Defendants' Witnesses (continued).

	PAGE
Harry Colins	
Direct	264
Cross	268
Adolph Zukor	
Direct	278
Cross	283
Thomas D. Lindholtz:	
Direct	285
Cyril Provo Hubert:	
Direct	290
Cross	292
Jesse T. Mills:	
Direct	292
Cross	301
(Recalled)	
Direct	326
Cross	354
Re-direct	366
Re-cross	377
Re-re-direct	379
Re-re-cross	380
Re-re-re-direct	382
Re-re-re-cross	400
Re-re-re-direct	419
(Recalled)	
Cross	439
Re-direct	439
Re-cross	441
Re-re-direct	445
Re-re-cross	445
Re-re-re-direct	447

Defendants' Witnesses (continued):

	PAGE
(Recalled)	
Direct	467
Cross	481
Re-direct	483
Re-cross	508
By the Referee	514
Re-cross (cont'd)	516
(Recalled)	
Cross	532
(Recalled)	
Direct	704
(Recalled)	
Direct	737
Charles E. Deesen:	
Direct	322
Cross	326
William L. Keating:	
Direct	423
Cross	429
Re-direct	437
Irving Schlosberg:	
Direct	529
Alexander Lichtman:	
Direct	540
Cross	548
Re-direct	558
Daniel Jaycocks:	
Direct	562
Cross	569
Re-direct	572
George P. Skouras:	
Direct	573
Cross	578
Re-direct	586

Defendants' Witnesses (continued).

	PAGE
John M. Benas:	
Direct	588
Samuel Rinzler:	
Direct	596
Cross	599
Nathan J. Blumberg:	
Direct	600
Cross	604
Re-direct	606
Louis Notarius:	
Direct	608
Cross	612
Re-direct	613
Re-cross	614
Re-re-direct	614
William Yoost:	
Direct	616
Cross	620
Arthur M. Loew:	
Direct	642
David Blum:	
Direct	655
Cross	658
Robert L. Giffin:	
Direct	661
Cross	669
Sidney R. Fleischer:	
Direct	670
Charles Moskowitz:	
Direct	688

Defendants' Witnesses (continued).

	PAGE
J. Robert Rubin:	
Direct	717
Cross	733
Re-direct	735
Re-cross	736
Joseph R. Vogel:	
Direct	750
Cross	755
Re-direct	759

COMPLAINANTS' WITNESS:

Max. Prager:	
Direct	740

DEFENDANTS' (NEW YORK) EXHIBITS:

6—Statements as to "Percentage retained by Foreign Distributors" of "Letty Lynton", marked in evidence at folio 51.....	764
9—Statement entitled "Depreciation—Los Angeles Studio", marked in evidence at folio 891.....	765
10—Statement as to "interest paid" to Loew's Incorporated. Total \$1,559,559.70, marked in evidence at folio 899.....	765
15—Schedule showing, by numbers and dates, receipt of Exhibitors' contracts, covering "Joan Crawford No. 2 Production 208" ("Letty Lynton"), marked in evidence at folio 971.....	766
16—Form of contract as entered into with Exhibitors (1932) covering production (as above entitled), marked in evidence at folio 971.....	767

Defendants' (New York) Exhibits (continued).

	Page
17—"Corporation Organization Chart—August 31, 1932" with annexed sheet "Subsidiaries of Culver Export Corporation distributing in Foreign Countries, August 31, 1932", marked in evidence at folio 979.....	770
18*—Net income from "Letty Lynton", marked in evidence at folio 983.....	773
18-A—Total distributing expense ratio to film rental income, year ended August 31, 1932, marked in evidence at folio 983.....	774
18-B—Home office expenses of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation year ended August 31, 1932, marked in evidence at folio 983.....	775
18-C1 to C3—Salaries year ended August 31, 1932, marked in evidence at folio 984.....	776 to 779
18-D1 to D5—Completed negative cost "Letty Lynton", marked in evidence at folio 984.....	780 to 788
18-E1 and E2—Schedule A "Studio Overhead", marked in evidence at folio 984.....	789 to 791
18-F—Interest on investment in Studio plant and equipment, year ended August 31, 1932, marked in evidence at folio 984.....	792
19*—Net income from "Letty Lynton", marked in evidence at folio 1099.....	793
19-A—Total distributing expense ratio to film rental income year ended August 31, 1932, marked in evidence at folio 1099.....	794

* Exhibits 18. to 18-F constitute the amended account of Metro-Goldwyn Pictures Corporation.

* Exhibits 19 to 19-E constitute the amended account of Metro-Goldwyn-Mayer Distributing Corporation.

Defendants' (New York) Exhibits (continued).

	PAGE
19-B—Home Office Expenses of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, year ended August 31, 1932, marked in evidence at folio 1099.....	795
19-C—Branch Office Expenses—year ended August 31, 1932, marked in evidence at folio 1099.....	796
19-D—Depreciation—Branch Equipment—year ended August 31, 1932, marked in evidence at folio 1099.....	797
19-E—Interest on Investment in Branch Office Equipment—year ended August 31, 1932, marked in evidence at folio 1099.....	798
20*—Culver Export Corporation Net Income from "Letty Lynton", marked in evidence at folio 1156.....	799
20-A—Total Distributing Expense Ratio to film rental income, year ended August 31, 1933, marked in evidence at folio 1156.....	799
20-B—Sundry Schedules, year ended August 31, 1933, marked in evidence at folio 1156.....	800
20-C—Salaries, year ended August 31, 1933, marked in evidence at folio 1156.....	801
20-D—Cost of production, "Letty Lynton", marked in evidence at folio 1156.....	802
21**—Foreign Subsidiaries. Net Income from "Letty Lynton", marked in evidence at folio 1160.....	803

* Exhibits 20 to 20-D constitute the amended account of Culver Export Corporation (exclusive of Foreign Subsidiaries).

** Exhibits 21 to 21-B3 constitute the amended account of the foreign subsidiaries of Culver Export Corporation.

Defendants' (New York) Exhibits (continued).

	PAGE
21-A1—Net income attributed to "Letty Lynton" (Foreign Versions) showing Distribution of Profit of Foreign Subsidiaries by countries, marked in evidence at folio 1160.....	804
21-A2—Net Income attributed to "Letty Lynton" (English Versions) showing Distribution of Foreign Subsidiaries by countries, marked in evidence at folio 1160.....	805
21-B1 to B3—Total Distributing Expense Ratio to Film Rental Income, year ended August 31, 1933, marked in evidence at folio 1160.....	807 to 809
22—Metro-Goldwyn-Mayer-Culver City Analyses of Changes in Continuity and Production Balances, marked in evidence at folio 1274.....	810
23—M-G-M Studio. Continuities used and rejected 1930-1936 inclusive, marked in evidence at folio 1281.....	811
24—Metro-Goldwyn-Mayer Corporation—Comparative Statement of Direct Production for the Fiscal Years ended 1930 to 1936 inclusive, marked in evidence at folio 1283.....	812
25—Apportionment of Studio overhead on basis of Gross Receipts of Pictures Produced at Studio, marked in evidence at folio 1323.....	813
26—Short Review of "Letty Lynton" prepared by witness Louis Notarius for Paramount Theatres, marked in evidence at folio 1847.....	814
27-A—List of Officers and Directors of Defendant Loew's Incorporated, marked in evidence at folio 1941.....	815
27-B—List of Officers and Directors of Defendant, Metro-Goldwyn Pictures Corporation, marked in evidence at folio 1941.....	816

Defendants' (New York) Exhibits (continued).

PAGE

27-C—List of Officers and Directors of Defendant, Metro-Goldwyn-Mayer Distributing Corporation, marked in evidence at folio 1941.....	817
27-D—List of Officers and Directors of Defendant, Culver Export Corporation, marked in evidence at folio 1941.....	818
28-A to 28-E—Corporations formerly subsidiary to Culver Export Corporation (now subsidiary to Loew's Incorporated), marked in evidence at folio 1967	819 to 823
29-A and 29-B—Sales of motion picture rights in plays (1932) made up by witness Sidney R. Fleischer (printed herein at pages 675 to 676), marked in evidence at folio 2024.	
30 for Identification—Portions of letter of July 14, 1937, from Ligon Johnson, Esq. to Samuel D. Cohen, containing statement as to runs of plays embraced in Exhibit 29-A to 29-B (printed herein at pages 680 to 685), marked in evidence at folio 2038.	
31—Extracts from Certificate of Incorporation and By-Laws of Motion Picture Producers and Distributors of America, marked in evidence at folio 2145	825
32—Resolution of Motion Picture Producers and Distributors of America re dues of members, with application for Class A membership, marked in evidence at folio 2146.....	828
33—Pages 1 to 51 of Printed Papers embodied contract between Louis B. Mayer Pictures (copartnership) and Metro-Goldwyn Pictures Corporation, Loew's Incorporated, etc., marked in evidence at folio 2157	832

Defendants' (New York) Exhibits (continued).

	PAGE
34—Copy of Resolution of Board of Directors of May 8, 1930, approving contract, marked in evidence at folio 2189.....	883

DEFENDANTS' (CULVER CITY) EXHIBITS:

C-24—Schedule as to Shorts for fiscal year 1931-32, marked in evidence at folio 670.....	885
C-25—Statement entitled "Statement showing Production costs accrued on Features during Fiscal year 1932 and Percentage of Completed Costs and Shooting Time", marked in evidence at folio 671	886
C-27—List of Pictures released during the fiscal year 1932 regardless of when they were produced, marked in evidence at folio 789.....	888
C-29—Exhibit headed "Schedule A-1 Studio Overhead", marked in evidence at folio 863.....	889
C-30—Four sheets containing Craig's computations of overhead ratios on cost and material basis, marked in evidence at folio 2143.....	893
C-31—Letter, Craig to S. D. Cohen of Sept. 10, 1937, re four sheets above, marked in evidence at folio 2144.....	897
C-32—Schedule of charges of stars' unassigned time, marked in evidence at folio 2149.....	899

DEFENDANT, LOEW'S INCORPORATED, EXHIBITS:

L-1—Exhibit tendered as complete accounting by Loew's Incorporated, showing only stock ownership in theatre companies which exhibited "Letty Lynton", marked in evidence at folio 1370.....	900
---	-----

Defendant, Loew's Incorporated, Exhibits (continued).

	PAGE
L-2—Weekly statement Metropolitan Theatre, Brooklyn (week ending May 20, 1932), marked in evidence at folio 1401.....	904
L-3—Computation of overhead as to Metropolitan Theatre, Brooklyn, marked in evidence at folio 1403	905
L-4—Weekly Statement Lexington Theatre (N. Y.) week ending May 20, 1932, marked in evidence at folio 1433.....	906
L-5—Computation of overhead as to Lexington Theatre (N. Y.), marked in evidence at folio 1435.....	907
L-6*—Schedule showing Profit or Loss of Theatres operated by corporations wholly owned by Loew's Incorporated, marked in evidence at folio 1484..	908
L-7—Overhead expenses of theatres listed in Exhibit L-6, marked in evidence at folio 1487.....	909
L-8—Schedule showing Profit or Loss of theatres operated by Corporations partly owned by Loew's Incorporated, marked in evidence at folio 1513..	910
L-8+—Schedule showing profit as to two additional theatres (omitted from Exhibit L-8), marked in evidence at folio 1594.....	911
L-9—Overhead expenses of theatres listed in Exhibit L-8, marked in evidence at folio 1514.....	912
L-10—Schedule showing Profit or Loss of theatres operated by corporations in which Loew's Incorporated have indirect stock ownership, marked in evidence at folio 1587.....	913
L-11—Overhead Expenses of Theatres listed in Exhibit L-10, marked in evidence at folio 1589.....	914

* Exhibits L-6 to L-13, inclusive, constitute the account of 100 odd theatres in which Loew's Incorporated had stock interest or otherwise which exhibited the motion picture "Letty Lynton".

Defendant, Loew's Incorporated; Exhibits (continued).

	PAGE
L-12—Schedule showing Profit or Loss of Theatres Managed by Marcus Loew Booking Agency, marked in evidence at folio 1590.....	915
L-13—Overhead expense of Theatres listed in Defendants' Exhibit L-12, marked in evidence at folio 1591	916

Defendants' exhibit offered before the Special Master from the Proceedings Before Accounting (Prior Printed Record) and marked herein Defendants' Exhibits R-1, R-2, etc., as well as testimony offered before the Special Master from such prior proceedings, are listed separately immediately following the index to Complainants' exhibits.

COMPLAINANTS' EXHIBITS:

B-4, B-11, B-13, B-27, B-29, B-37, B-39 and B-43—Manager's reports as to certain theatres listed on Defendants' Exhibit L-6, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1527....917 to 924

C-3, C-12 and C-13—Manager's reports as to certain theatres listed on Defendants' Exhibit L-8, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1597925 to 927

D, D-4, D-8, D-10 and D-20—Manager's reports as to certain theatres listed on Defendants' Exhibit L-10, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1598.....928 to 932

Complainants' Exhibits (continued).

PAGE

E-7—Manager's Report of Fox Theatre, Atlanta, Ga., one of the theatres listed on Exhibit L-12 covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1599..... 933

M—Officers and Directors of Theatre Companies, marked in evidence at folio 2034..... 934

Statement as to Testimony and Exhibits printed in the Proceedings before Accounting (hereinafter for brevity referred to as P. P. R.) and reoffered in evidence in the Accounting Proceedings before the Special Master.

(Each reference to the prior printed record, whether to testimony or exhibits has been given, at the request of the Special Master, a separate reference number, and in the case of exhibits from the prior printed record, separate exhibit numbers, R-1, R-2, etc., have been super-added.)

Reference No. 1—Testimony of Margaret Ayer Barnes (actually incorporated in this record)..... 631

Reference No. 2—Letter of April 15, 1931 and agreement of April 17, 1931 in relation to purchase of motion picture rights of play "Dishonored Lady" (P. P. R. "Complainants' Exhibit 8", pp. 788-803; marked herein Defendants' Exhibit R-1)..... 635

Reference No. 3—Testimony of Jesse L. Lasky (actually incorporated in this record)..... 637

Reference No. 4—"Trial of Madeleine Smith" (Book) (Defendants' Exhibit E of original record, marked herein Defendants' Exhibit R-2; not printed as part of either record, but will be handed up on the argument)..... 639

*References to Record of Proceedings before Accounting
(continued).*

PAGE

Reference No. 5—Manuscript of Complainants' play, "Dishonored Lady" (Complainants' Exhibit 1, of original record, P. P. R., pp. 237-494; marked herein as Defendants' Exhibit R-3)..... 640

Reference No. 6—Continuity of motion picture "Letty Lynton" (Complainants' Exhibit 3 of original record, P. P. R., pp. 495-622; marked herein as Defendants' Exhibit R-4)..... 640

Reference No. 7—Novel "Letty Lynton" by Mrs. Belloc Lowndes (Defendants' Exhibit C of original record, marked herein as Defendants' Exhibit R-5, not printed as part of either record, but will be handed up on the argument)..... 641

Reference No. 8—Assignment of motion picture rights to the nov "Letty Lynton" (Defendants' Exhibit D of original record, P. P. R., pages 826-828, marked herein as Defendants' Exhibit R-6)..... 641

Reference No. 9—Testimony of Irving Thalberg (P. P. R., pages 73-81)..... 677

Reference No. 10—Testimony of Hunt Stromberg (P. P. R., pages 81-114)..... 677

Reference No. 11—Testimony of John Meehan (P. P. R., pages 114-130)..... 677

Reference No. 12—Testimony of Clarence L. Brown (P. P. R., pages 131-139)..... 677

Reference No. 13—Testimony of Wanda Tuchok (P. P. R., pages 140-142)..... 678

*References to Record of Proceedings before Accounting
(continued).*

	PAGE
Reference No. 14—Testimony of Samuel Marx (P. P. R., pages 142-143)	678
Reference No. 15—Testimony of Edna Schley (P. P. R., pages 144-146)	678
Reference No. 16—Testimony of Gabriel L. Hess (P. P. R., pages 59-71)	686
Reference No. 17—Resolution of Motion Picture Pro- ducers and Distributors of America (Defendants' Exhibit A of original record, P. P. R., pages 805- 813; marked herein as Defendants' Exhibit R-7) ..	686
Reference No. 18—Testimony of J. Robert Rubin (actu- ally incorporated in this record)	739

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

1

EDWARD SHIELDON and MARGARET AYER BARNES,
Complainants-Appellees and Appellants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN
MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and
CULXER EXPORT CORPORATION,

Defendants-Appellants and Appellees.

(Cross Appeals.)

2

Statement Under Rule XIII.

This action was commenced by the serving and filing of the bill of complaint on or about June 24, 1932.

Issue was joined by filing of answers of the defendants on July 25, 1932.

The case came up for trial before Hon. John M. Woolsey, United States District Judge for the Southern District of New York, on April 22nd and 23rd, 1933.

Decree dismissing the bill of complaint entered by District Court on August 8, 1934.

3

Appeal taken from decree of dismissal to Circuit Court of Appeals, Second Circuit on September 21, 1934.

(The transcript of record filed on such prior appeal, by stipulation of the parties, will herein be called the Proceeding before Accounting and the portions of such record material upon this appeal will be incorporated herein by reference to such prior record.)

Opinion of Circuit Court of Appeals reversing the decree below and directing judgment against the defendants with

2
Statement Under Rule XIII.

4 a decree for damages and an accounting filed on January 17th, 1936 (Reported in 81 Fed. 49).

Mandate of the Circuit Court of Appeals issued to District Court on February 5, 1936.

Defendants' petition for certiorari to the United States Supreme Court denied on May 4, 1936 (Reported in 298 U. S. 669).

District Court upon the mandate entered a decree, appointing the Hon. Gordon Auchincloss as Special Master and directing the taking of the accounting on July 29, 1936.

Hearings before the Special Master began on September 9, 1936 and the final hearing held on March 16, 1938.

Report of Special Master filed on May 9, 1938.

5 Motion of complainants to confirm, etc. made on June 7, 1938 and argued on July 5, 1938.

Final decree entered on January 7, 1939 and resettled on January 23, 1939.

Appeals from such resettled final decree have been taken both by the defendants and by the complainants—by the defendants on March 27, 1939 and by the complainants on March 29, 1939.

The names of the parties are stated in full in the above title. O'Brien, Driscoll & Raftery appear for complainants. J. Robert Rubin appears for defendants Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn Pictures Corporation. Leopold Friedman appears for defendant Loew's, Inc. Samuel D. Cohen appears for defendant Culver Export Corporation.

6 There has been no change of parties or attorneys since the commencement of the within action, except that Leopold Friedman, Esq. and Samuel D. Cohen, Esq. have been substituted as attorneys for the defendants Loew's Incorporated and Culver Export Corporation respectively in place of Nathan Burkan, Esq., deceased, and O'Brien, Driscoll and Raftery have succeeded the firm of O'Brien, Malevinsky and Driscoll as attorneys for the complainants.

Bill of Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity No. E 69-218.

EDWARD SHELTON and MARGARET AYER BARNES,

Complainants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S INC., and CULVER EXPORT CORPORATION,

Respondents.

The complainants herein by their solicitors, O'Brien, Malevinsky & Driscoll, complaining of the respondents, respectfully allege and represent:

FIRST: Complainants invoke the jurisdiction of this court upon the ground that the Copyright Law of the United States is directly involved in this action and upon the ground that the matters and things in controversy embody and include complainants' copyright title as hereinafter set forth.

SECOND: Complainant Margaret Ayer Barnes is a citizen of the United States, residing and having her domicile in the City of Chicago, in the County of Cook, in the State of Illinois.

THIRD: Complainant Edward Shelton is a citizen of the United States, residing and having his domicile in the Borough of Manhattan, City, County and State of New York.

FOURTH: Respondent Metro-Goldwyn Pictures Corporation is a corporation created and existing under and by virtue of the Laws of the State of Delaware, and has one of its principal offices and place of business where practically all of its officials are domiciled and located at No. 4540 Broadway, in the Borough of Manhattan, City,

Bill of Complaint.

10 County and State of New York, and where the major portion of its business activities are transacted and directed.

FIFTH: Respondent Metro-Goldwyn-Mayer Distributing Corporation is a domestic corporation, having its general offices and place of business at 1540 Broadway, in the Borough of Manhattan, City, County and State of New York.

11 SIXTH: Respondent Loew's Inc. is a corporation created and existing under and by virtue of the Laws of the State of Delaware, and has one of its principal offices where practically all of its officials are domiciled and located at No. 1540 Broadway, in the Borough of Manhattan, City, County and State of New York, and where the major portion of its business activities are transacted and directed.

SEVENTH: Respondent Culver Export Corporation is a domestic corporation having its general offices and place of business at 1540 Broadway, in the Borough of Manhattan, City, County and State of New York.

EIGHTH: Respondent Metro-Goldwyn Pictures Corporation is a manufacturer of what is commonly characterized and known as motion pictures and motion picture photoplays, and will hereinafter for all the purposes of this complaint be designated as the "*Manufacturer*".

12 NINTH: Respondent Metro-Goldwyn-Mayer Distributing Corporation is a distributor of what is commonly characterized and known as motion pictures and motion picture photoplays, and will hereinafter for all the purposes of this complaint be designated as the "*Distributor*".

TENTH: Respondent Loew's Inc., upon information and belief, owns one hundred (100%) percent of the stock of Metro-Goldwyn Pictures Corporation and one hundred (100%) percent of the stock of Metro-Goldwyn-Mayer Distributing Corporation, and owns and/or operates and/or maintains and/or controls a large number of motion picture theatres located in the City of New York, State of New York, and divers and sundry other States of the

Bill of Complaint.

United States of America, and will hereinafter for all the purposes of this complaint be designated as "*Loew's*".

10a

ELEVENTH: Respondent Culver Export Corporation, upon information and belief, distributes all of the "*manufacturer's*" and "*distributor's*" pictures aforementioned in all foreign countries outside of the United States of America.

TWELFTH: Upon information and belief each and all of the defendants are interwoven in all of their operations of manufacturing and distributing pictures and are jointly and severally tort feorsors in respect to the matters and things hereinafter set forth and specified.

11a

THIRTEENTH: That prior to January 18, 1930, complainants created, originated, invented and wrote a new novel play entitled "*Dishonored Lady*".

FOURTEENTH: That on January 18th, 1930, complainants duly filed, deposited and registered said play with the Librarian of Congress in the Copyright Office of the United States of America, as in such cases by law made and provided, paying the legal fees required by law.

FIFTEENTH: That on January 18th, 1930, there was duly issued to complainants under the seal of the Copyright Office by Thorwald Solberg, Register of Copyrights, pursuant to the Copyright Statutes, a certificate of copyright, reading as follows:

12a

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
OF THE UNITED STATES OF AMERICA
WASHINGTON

D2

CERTIFICATE OF COPYRIGHT REGISTRATION

THIS IS TO CERTIFY, in conformity with Section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that

Bill of Complaint.

10b ONE copy of the DRAMATIC COMPOSITION named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years has been duly made in the name of

Margaret Ayer Barnes, Chicago, Ill., and
Edward Sheldon, New York, N. Y.

"Title of Drama: Dishonored Lady, a Play in Three Acts. By Margaret Ayer Barnes and Edward Sheldon, of the United States.

Copy received Jan. 18, 1930. Entry:

11b Class D, No. 3924.

THORWALD SOLBERG
Register of Copyrights.

(Seal)

Librarian of Congress
Copyright
Office

United States of America."

12b SIXTEENTH: That under and by virtue of said registration and the issuance of said copyright certificate complainants became and at all times since continued to be and now remain the sole and exclusive owners and holders of the copyright title and of each and every right, title and interest connected with, flowing from, or appertaining thereto as vested in complainants by said copyright title under the Copyright Statutes and Laws of the United States of America, including all of the rights which complainants hereinafter allege have been illegally and unlawfully infringed and violated by the respondents, including the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(d) To perform or represent the copyrighted work

Bill of Complaint.

publicly if it be a drama or, if it be a dramatic work 10c
 and not reproduced in copies for sale, to vend any
 manuscript or any record whatsoever thereof; to
 make or to procure the making of any transcription
 or record thereof by or from which, in whole or in
 part, it may in any manner or by any method be
 exhibited, performed, represented, produced, or re-
 produced; and to exhibit, perform, represent, pro-
 duce, or reproduce it in any manner or by any method
 whatsoever.

SIXTEENTH (a): That on or about April 17th, 1931, and 11c
 pursuant to negotiations that had theretofore taken place,
 complainants had delivered to and there had remained in
 the possession of the "manufacturer" the manuscript of the
 play "Dishonored Lady". That on or about said date a
 tentative contract had been prepared wherein and whereby
 it was proposed that complainants should sell to the "manu-
 facturer" the motion picture rights of said play "Dishonored
 Lady". That "manufacturer" had agreed and proposed to
 pay to complainants the sum of Thirty Thousand Dollars
 (\$30,000) for the motion picture rights of the play "Dis-
 honored Lady".

SIXTEENTH (b): The "manufacturer" as well as the 12c
 "distributor" then and there knew and were fully cognizant
 of the fact that complainants were the authors and pro-
 prietors of said play "Dishonored Lady" and the copyright
 title thereto, and that for motion picture purposes said
 literary property and dramatic play copyrighted as afore-
 said belonged to and was possessed by the complainants.

SEVENTEENTH: Notwithstanding the foregoing the "manu-
 facturer" failed to carry out its contract of purchase and
 shortly thereafter illegally and unlawfully manufactured a
 picture entitled "Letty Lynton", which the respondents
 jointly and severally then and there undertook to distribute
 and sell for profit in the various motion picture houses
 exhibiting pictures throughout the world.

Bill of Complaint.

10d EIGHTEENTH: That the picture manufactured by the "manufacturer" entitled "Letty Lynton" is a talking motion picture photoplay; (a) that said photoplay "Letty Lynton" is a deliberate piracy and infringement of complainants' play "Dishonored Lady"; (b) the "manufacturer" illegally and unlawfully, wilfully and deliberately, copied complainants' play "Dishonored Lady"; (c) copied and made use of the same technique, dramatic situations and/or episodes, dramatic plot and its treatment, embellishment and detail; (d) copied and made use of the same series of events and episodes with the conscious intention and purpose to excite by presentation and representation in "Letty Lynton" the same emotions in the same sequence with the same casual relation as complainants had invented and created in their play "Dishonored Lady".

11d

NINETEENTH: Complainants have not at any time granted to the respondents, or any of them, any right, license or privilege to produce, present or represent in a talking motion picture, or otherwise, their play "Dishonored Lady", or to make any dramatization of any character whatsoever in picture form of said play.

12d TWENTETH: Upon information and belief the respondents and each of them have undertaken and are continuing to undertake to their profit and pecuniary advantage to distribute, license, lease, sell, and use said talking motion picture "Letty Lynton" infringing and pirating complainants' play "Dishonored Lady" throughout the United States of America, and each and every State and dependency thereof, and in all foreign countries of the world.

TWENTY-FIRST: That "Loew's" has undertaken to exhibit and is continuing to undertake to exhibit in its motion picture theatres in the State of New York, including the City of New York and in divers and sundry other States of the United States of America, said talking motion picture entitled "Letty Lynton", infringing and pirating complainants' play "Dishonored Lady"; and that in that behalf of "Loew's" is collecting large sums of money and

Bill of Complaint.

securing large profits from the exhibition of said infringed and pirated play. 10c

TWENTY-SECOND: That by virtue of the respondents' illegal and unlawful acts as aforesaid the value of complainants' property is being rapidly destroyed.

TWENTY-THIRD: That the acts of the respondents are wrongful and continuing, consecutive and destructive. Complainants have no adequate remedy at law. The damage to the complainants is immediate; unless the respondents are enjoined and restrained by an injunction pendente lite and permanently, the value of the complainants' property will be dissipated and destroyed and complainants irreparably and irretrievably injured. 11c

TWENTY-FOURTH: Complainants file together with this, their Bill of Complaint, the manuscript copy of their play "Dishonored Lady", and demand, pursuant to the Copyright Laws, the Rules of the Supreme Court of the United States and of this Court in such cases made and provided, that the respondents file forthwith with the Clerk of this Court a manuscript or scenario and continuity of their talking motion picture entitled "Lefty Lynton," and a positive copy of said talking motion picture entitled "Lefty Lynton" as the same is now being exhibited as aforesaid in order that this honorable court may take cognizance thereof and from an examination and showing of said manuscript, scenario, continuity and positive copy of the said talking motion picture be fully advised in the premises to the end that the complainants' rights in the premises may be fully protected. 12c

WHEREFORE, THE COMPLAINANTS PRAY:

(1) That a writ of subpoena issue out of this court directed to the respondents and each of them, commanding them to appear and answer this Bill of Complaint within twenty (20) days after the service of said writ.

(2) That the respondents and each of them, and all persons, firms or corporations acting under the respondents'

Bill of Complaint.

10f direction, control, permission and license be enjoined and restrained ~~p~~endente life and permanently and perpetually thereafter from publicly or privately producing, presenting, performing or representing, publishing or advertising, distributing, showing or exhibiting in any manner or form whatsoever at any time or place in the United States of America, or in any other country of the world, their said pirating and infringing talking motion picture at present entitled "Letty Lynton", or permitting said talking motion picture entitled "Letty Lynton" to be publicly or privately produced, presented, performed or represented, published or advertised, distributed, shown or exhibited in any manner or form whatsoever at any time or place in the United States of America, or in any other country of the world.

11f (3) That the negative and positive prints of the said talking motion picture entitled "Letty Lynton" be impounded under the orders and directions of this honorable court to the end that complainants' rights may not be further infringed by the respondents.

12f (4) That the respondents and each of them be required to account for and pay over to the complainants any and all profits derived from any and all productions and presentations, showings, or exhibitions of said talking motion picture entitled "Letty Lynton" at any and all places in the United States of America, or other countries of the world, whether such showings or exhibitions, presentations or representations have been public or private, and that to that end and for that purpose the respondents and each of them be required to exhibit their books, documents, papers and accounts in their possession with relation to all funds, moneys and receipts derived from the presentation, exhibition or showing of said talking motion picture entitled "Letty Lynton" and the method of their application.

(5) That the respondents and each of them be required to pay to the complainants any and all damages sustained by the complainants in the premises, and any of the penal-

*Answer of Defendants Metro-Goldwyn Pictures Corporation
and Metro-Goldwyn-Mayer Distributing Corporation.*

10g

ties of any and every character imposed by the Copyright Laws of the United States of America.

(6) That the respondents and each of them pay the costs of this court and that a reasonable attorneys' fee be allowed to the complainants.

(7) That the complainants have such other and further relief as the equity of the case may require and conformably to the Copyright Act of the United States in such case made and provided.

O'BRIEN, MALEYINSKY & DRISCOLL,

Solicitors for Complainants,

11g

Office & P. O. Address,

152 West 42nd Street,

Borough of Manhattan,

City of New York.

(Sgd.) **MOSES L. MALEVINSKY,**

Solicitor for Complainants.

(Verified by Margaret Ayer Barnes, one of the complainants, on June 9, 1932.)

Answer of Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

12g

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, by their solicitor, J. Robert Rubin, answering the bill of complaint herein:

1. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations

*Answer of Defendants Metro-Goldwyn Pictures Corporation
and Metro-Goldwyn-Mayer Distributing Corporation.*

10h contained in paragraphs "First", "Second", "Third", "Fourth" and "Fifteenth" thereof.

2. Upon information and belief, deny each and every allegation contained in paragraphs "Eighth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Sixteenth", "Sixteenth (b)", "Seventeenth", "Eighteenth", "Twentieth", "Twenty-first", "Twenty-second", "Twenty-third" and "Twenty-fourth" thereof.

11h 3. Upon information and belief, deny each and every allegation contained in paragraph "Sixteenth (a)", except that the defendants admit, upon information and belief, that on April 17, 1931, a certain tentative contract had been entered into between complainants and others and the defendant Metro-Goldwyn-Mayer Corporation, whereby the said complainants and others agreed to sell to the said Metro-Goldwyn-Mayer Corporation and the said Metro-Goldwyn-Mayer Corporation agreed to purchase from the said complainants and others motion picture rights in and to the play "Dishonored Lady" for the sum of Thirty thousand dollars (\$30,000.00), provided and on condition that the Motion Picture Producers & Distributors of America, Inc., would give its consent and approval to the production of the said motion picture within thirty days; that the said Motion Picture Producers & Distributors of America, Inc., found the said play, "Dishonored Lady", indecent, salacious and immoral and for that reason failed and refused to give its consent to the production of the said motion picture.

12h

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE THESE DEFENDANTS ALLEGE:

4. Upon information and belief, that the plaintiffs were not the original and first composers or authors of the dramatic composition entitled "Dishonored Lady"; that the situations, scenes, characters, developments, plot and theme

*Answer of Defendants Metro-Goldwyn Pictures Corporation
and Metro-Goldwyn-Mayer Distributing Corporation.*

10i

of said dramatic composition, "Dishonored Lady", had for many years prior to 1927 been in the public domain and particularly in the record and in the various accounts of the trial of one Madeleine Smith, who was tried for murder in Glasgow, Scotland, in or about the year 1857; that the theme, plot, scenes, sequences, characters, situations and developments of the dramatic composition "Dishonored Lady" were not new or original with the plaintiffs. They had all been used many years prior thereto by other dramatists and writers and comprised stock material which had been in frequent use by playwrights, authors and writers for many years prior to the alleged creation of said dramatic composition, "Dishonored Lady"; that by reason of the premises plaintiffs procured no copyright protection in said dramatic composition, "Dishonored Lady", and complainants have no valid copyright therein.

11i

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint, and that the defendants and each of them be awarded a reasonable counsel fee.

J. ROBERT RUBIN,

Solicitor for Defendants Metro-
Goldwyn Pictures Corporation
and Metro-Goldwyn-Mayer Dis-
tributing Corporation,

12i

Office and P. O. Address,

1540 Broadway,

Borough of Manhattan,

City of New York.

(Verified by Edward Bowes, vice-president of Metro-
Goldwyn Pictures Corporation, on July 25, 1932.)

**Answer of Defendants Loew's Inc. and Culver
Export Corporation.**

10j UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendants Loew's Inc. and Culver Export Corporation, by their solicitor, Nathan Burkan, answering the bill of complaint herein:

1. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "First", "Second", "Third", "Fourteenth" and "Fifteenth" thereof;

11j 2. Upon information and belief, deny each and every allegation contained in paragraphs "Eighth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Sixteenth", "Sixteenth (b)", "Seventeenth", "Eighteenth", "Twentieth", "Twenty-first", "Twenty-second", "Twenty-third" and "Twenty-fourth" thereof.

12j 3. Upon information and belief, deny each and every allegation contained in paragraph "Sixteenth (a)", except that the defendants admit, upon information and belief, that on April 17, 1931, a certain tentative contract had been entered into between complainants and others and the defendant Metro-Goldwyn-Mayer Corporation, whereby the said complainants and others agreed to sell to the said Metro-Goldwyn-Mayer Corporation and the said Metro-Goldwyn-Mayer Corporation agreed to purchase from the said complainants and others, motion picture rights in and to the play "Dishonored Lady" for the sum of Thirty thousand dollars (\$30,000.00), provided and on condition that the Motion Picture Producers & Distributors of America, Inc., would give its consent and approval to the production of the said motion picture within thirty days; that the said Motion Picture Producers & Distributors of America, Inc., found the said play "Dishonored Lady" indecent, salacious and immoral and for that reason failed and refused to give its consent to the production of the said motion picture.

*Answer of Defendants Loew's Inc. and Culver
Export Corporation*

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE THESE DEFENDANTS ALLEGE:

4. Upon information and belief, that the plaintiffs were not the original and first composers or authors of the dramatic composition entitled "Dishonored Lady"; that the situations, scenes, characters, developments, plot and theme of said dramatic composition, "Dishonored Lady", had for many years prior to 1927 been in the public domain and particularly in the record and in the various accounts of the trial of one Madeleine Smith, who was tried for murder in Glasgow, Scotland, in or about the year, 1857; that the theme, plot, scenes, sequences, characters, situations and development of the dramatic composition "Dishonored Lady" were not new or original with the plaintiffs. They had all been used many years prior thereto by other dramatists and writers and comprised stock material which had been in frequent use by playwrights, authors and writers for many years prior to the alleged creation of said dramatic composition, "Dishonored Lady"; that by reason of the premises plaintiffs procured no copyright protection in said dramatic composition, "Dishonored Lady", and complainants have no valid copyright therein.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint, and that the defendants and each of them be awarded a reasonable counsel fee.

NATHAN BURKAN,

Solicitor for Defendant Loew's
Inc. and Culver Export Cor-
poration,

Office & P. O. Address,

1450 Broadway,

Borough of Manhattan,

City of New York.

(Verified by Leopold Friedman, secretary of Loew's Inc., and by Lillian Reiss, assistant secretary of Culver Export Corporation, on July 25, 1932.)

[Certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit, on October 17th, 1939. Original Certification is included in original certified copy of record filed with Clerk of United States Supreme Court.]

Interlocutory Decree.

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 29th day of July, 1936.

Present—Hon. JOHN C. KNOX, *District Judge*.

In Equity—No. E-69-218.

EDWARD SJELDON and MARGARET AYER BARNES,
Complainants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,

Defendants.

The above-named complainants having appealed to the United States Circuit Court of Appeals for the Second Circuit from the decree made and entered herein on the 8th day of August, 1934, by Hon. John M. Woolsey, District Judge, and the said United States Circuit Court of Appeals for the Second Circuit after hearing said appeal having made its mandate directing this Court to reverse the aforesaid decree dated August 8, 1934, and to grant to the complainants an injunction as prayed for in the bill of complaint, together with a decree for damages and an accounting and to award the complainants an attorney's fee in the United States Circuit Court of Appeals for the Second

Interlocutory Decree.

Circuit and in this Court, both of said attorneys' fees to be fixed by this Court upon the final decree, and thereafter defendants having petitioned said Circuit Court for a rehearing, which petition was denied, and thereafter having petitioned the Supreme Court of the United States for a writ of certiorari, which petition was denied, and complainants having previously noticed a decree for settlement before Hon. John M. Woolsey, and the defendants having thereupon raised certain questions respecting the jurisdiction of this Court and the scope of the decree to be entered, and the said Hon. John M. Woolsey having overruled the said contentions, and the defendants having thereupon petitioned the Circuit Court of Appeals with respect thereto, which petition was denied, NOW THEREFORE, this Court, in pursuance of said mandate, and after due proceedings had, it is, upon consideration,

13

14

ORDERED, ADJUDGED AND DECREED, as follows:

1. That the above-named Edward Sheldon and Margaret Ayer Barnes are the authors of the dramatic composition mentioned in the complainants' bill and entitled "Dishonored Lady".

2. That on January 18, 1930, the complainants duly filed, deposited and registered said play with Register of Copyrights in the Copyright Office of the Library of Congress, of the United States of America, as in such cases by law made and provided, paying the legal fees provided by the law, and that on said 18th day of January, 1930, the said complainants duly obtained copyright as an unpublished work for said dramatic composition known as "Dishonored Lady", as more fully appears by the certificate of Thorvald Solberg, Register of Copyrights, dated January 18, 1930, and registered under Entry Class D No. 3924 in the Copyright Office of the United States of America.

15

Interlocutory Decree.

16 3. That the above defendants and each of them have infringed and violated the said copyright and the exclusive rights of said complainants vested in them under the aforesaid copyright by copying the complainants' aforesaid dramatic composition; by manufacturing therefrom a certain talking motion picture entitled "Letty Lynton" and by distributing or selling to third parties licenses to exhibit said talking motion picture "Letty Lynton" throughout the United States and its possessions and elsewhere; by giving and causing to be given or aiding and abetting in the giving of public performances and representations for profit of complainants' dramatic composition "Dishonored Lady" by

17 means of giving and causing to be given or aiding and abetting in the giving of public performances and representations of the aforesaid talking motion picture "Letty Lynton", and by otherwise trafficking in and dealing with complainants' dramatic composition for profit throughout the United States of America and other portions of the entire world, all of which has been done without warrant of law and in violation of the complainants' rights in the aforesaid copyright and without permission or license from the complainants.

18 4. That the complainants recover of the defendants and each of them all damages sustained by them and that the complainants recover of the defendants and each of them all gains and profits made by the defendants and each of them because of the said infringement upon complainants' copyright by copying said dramatic composition or by making the said motion picture "Letty Lynton" and by their use and trafficking in, or in any manner dealing with the said motion picture "Letty Lynton", or in any rights thereto or by giving public performances thereof, or causing, licensing, aiding and abetting or in any other manner assisting in the giving of public performances thereof, or in any other way, form or manner whatsoever.

Interlocutory Decree.

5. It is hereby referred to Gordon Auchincloss, Esq., 19
counsellor-at-law of 50 Broadway, in the Borough of Man-
hattan, City of New York, as Special Master, to ascertain
and report the amount of complainants' damages herein and
the amount of such gains and profits of the defendants
and each of them, and in addition, the said Special Master
shall report separately the amount of such gains and
profits of the defendants, obtained from all sources out-
side of the United States, and that the complainants, on
such accounting, have the right to cause an examination
of the defendants and their officers, servants, agents and
employees and each of them, and any and all other parties
or witnesses who may have any knowledge or information, 20
in regard to the subject matter, ore tenus or otherwise,
and a right to the production of all the books, vouchers,
contracts, documents and records of the defendants and
each of them, and the examination of such other witnesses,
whose testimony may be material to the issues and to
production of their books and records, and that said de-
fendants and other witnesses and each of them attend for
such purposes before said Special Master from time to time
as said Special Master shall direct.

6. That a writ of injunction issue out of and under the
seal of this Court, perpetually restraining and enjoining
said defendants and each of them, their agents, employees, 21
servants, workmen and others from publicly performing,
presenting, causing, licensing, aiding and abetting to be
publicly performed or presented said motion picture en-
titled "Letty Lynton".

7. That the complainants recover of the defendants and
each of them their costs and disbursements in this suit, to
be taxed by the Clerk of this Court.

8. Jurisdiction of this suit is retained for the purpose
of fixing and awarding to the complainants a reasonable

Interlocutory Decree.

22 attorneys' fee both in the United States Circuit Court of Appeals for the Second Circuit and in this Court as part of the costs, and for the purpose of making any further orders necessary to carry into effect this decree and to determine the amount to be awarded the complainants, and any further order necessary or proper to be made to effect a final adjustment and settlement of this controversy between the complainants and the defendants.

JNO. C. KNOX,
U. S. D. J.

23

24

Testimony Before Special Master.

25

New York Hearings.

[SAME TITLE.]

At the offices of the Referee,
No. 50 Broadway,
New York, N. Y.,
September 9, 1936, 10:30 A. M.

Stenographer's Minutes of Proceedings before GORDON
AUCHINCLOSS, Esq., Special Master, pursuant to order of 26
Hon. John C. Knox, *District Judge*, made and entered
herein on July 29, 1936.

Present—THE SPECIAL MASTER.

APPEARANCES:

For Complainants: O'BRIEN, DRISCOLL & RAFFERTY, by
Arthur F. Driscoll, Esq., Edward C. Rafferty and
Edward J. Clarke, Esq.

For Defendants, Metro-Goldwyn Pictures Corporation and
Metro-Goldwyn-Mayer Distributing Corporation: J. 27
ROBERT RUBIN, Esq., by Samuel D. Cohen, Esq., Walter
H. Pollak, Esq., and Earle L. Beatty, Esq., of Counsel.

And at hearings in California: LOEB, WALKER & LOEB,
Esqs., by Milton H. Schwartz, Esq., and Walter S.
Hilborn, Esq.

For Defendant, Culver Export Corporation: SAMUEL D.
COHEN, Esq.

For Defendant, Loew's Incorporated: LEOPOLD FRIEDMAN,
Esq.

George E. Berry—for Defendants—Direct.

28 The Special Master states that he has taken his oath as required by statute.

It is stipulated by and between counsel for the respective parties that the fees of the Special Master shall be in an amount to be fixed by the Court.

HEARING OF DECEMBER 2, 1936.

GEORGE E. BERRY, of 1540 Broadway, New York, N. Y., having been first duly sworn by the Special Commissioner, testified as follows:

29 Direct examination by Mr. Cohen:

Q. Mr. Berry, what is your occupation? A. Accountant.

Q. You are employed by whom? A. At the present time, you mean?

Q. Yes. A. Loew Incorporated.

Q. How long have you been so employed? A. For seventeen years.

Q. Are you acquainted with the accounts of Culver Export Corporation? A. I am.

30 Q. Please state in a general way how the accounts of Culver Export Corporation are kept and the routine in the office. A. When we receive statements from a foreign corporation, we take these statements and have them gone over and then taken to what we call the powers department, which is the department which punches up the income and the expenses and list it according to pictures from the various countries. This in turn is turned over to me and the credit is put through for the various pictures, cost and the income received of the various pictures.

Q. Culver Export Corporation is engaged, of course, in the business of exporting motion pictures? A. That is right.

George E. Berry—for Defendants—Cross.

Q. It has contracts with various corporations? A. That is right. 31

Q. Approximately how many? A. I should say about forty.

Q. And these corporations distribute the motion pictures in countries other than the United States? A. That is right.

Q. Are there at the present time existing contracts between Culver and these various corporations? A. Yes.

Q. How many versions of the picture were made for exhibition in various countries? A. The versions were four; five including the English version; four versions with foreign languages.

Q. In approximately how many foreign countries was the motion picture "Letty Lynton" exhibited? A. Approximately forty. 32

Cross examination by Mr. Raftery:

Q. Mr. Berry, these foreign versions, for example we will take the German version first, where was that made? A. The German version was made at the Culver City studio.

Q. It was made at or about the same time the picture was produced in California? A. Not necessarily.

Q. After the picture was produced? A. Yes.

Q. It was made in the Metro Studio in Culver City? A. Yes. 33

Q. Now, regarding the print cost, where are the French prints made? A. The French prints are made in France. They are made over there.

Q. The French negative is shipped from here to France? A. Yes.

Q. Did you usually ship just the negative, or the negative and one print? A. That I can't tell you. I think they shipped a dupe negative.

Q. That dupe negative is shipped to Paris? A. Yes.

George E. Berry—for Defendants—Cross.

34 Q. And any prints that are made for France or the French version are made in Paris? A. That is right.

Q. The only knowledge that you have regarding the moneys expended for prints are the statements that come over from the other side? A. That is right.

Q. About the German? A. The same way.

Q. The same thing? Those prints are made in Berlin? A. That is right.

Q. The Italian version? A. And the Italian, the same way.

Q. The English print cost that is listed here, of \$24,311.90, you shipped a negative to England? A. Yes.

35 Q. And your prints are made in England? A. That is right.

Q. So that this item of \$24,000, was that all incurred in England? A. None of it was in England.

Q. Where was that incurred? A. In various other countries where we shipped the prints directly to the other countries. We shipped most of our prints here for the other territory, but the prints for England are not included in that cost.

Q. Do you recall how many prints are included in that \$24,000 item? A. No, I couldn't tell you.

Q. Have you a record of it somewhere? A. We may have, how many prints we shipped to different territory.

36 Q. Will you look at your records in your office and give me the number of prints and the territory to which each of the prints were shipped? A. All right.

HEARING OF DECEMBER 11, 1936.

37

WILLIAM L. ENGELHARDT, of Rockville Center, Long Island, N. Y., called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. What is your occupation, Mr. Engelhardt? A. Accountant.

Q. Employed by whom? A. Loew's Inc.

Q. How long have you been so employed? A. Fifteen years.

Q. In your capacity as accountant for Loew's Inc. is it part of your duties to take care of the preparation of income tax returns for the Federal government? A. I assist in the preparation of income tax returns.

38

Q. Federal income tax returns? A. Federal income tax returns. I handle the State tax myself, not the Federal income tax returns.

Q. The State tax you handle exclusively? A. Yes.

Q. And the Federal income tax you assist with? A. That is right.

Q. In your capacity of accountant for Loew's Inc. did you assist in preparing income tax statements for Culver Export Corporation? A. I did.

39

Mr. Raftery: To save time, if you are seeking to prove that this man prepared tax returns and the proportionate part of the tax that he has allocated to the "Letty Lynton" receipts from the foreign field are the amounts set forth in the accounting, we will accept the figure but we object to its propriety in this accounting. It has no place in it.

Mr. Cohen: In other words, you object merely—

Mr. Raftery: To the deduction.

Alfred De Oro, Jr.—for Defendants—Direct.

40 Mr. Cohen: On the ground that it is not a proper deduction?

Mr. Raftery: On the ground that it is not a proper deduction.

Mr. Cohen: But you accept the figure as correct?

Mr. Raftery: Yes.

Mr. Cohen: That is all I wanted to prove by this witness.

41 ALFRED DE ORO, JR., of 600 West 157th Street, New York, N. Y., called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. Mr. De Oro, are you employed by Culver Export Corporation? A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. Are you acquainted with the contracts which Culver Export Corporation has with foreign corporations for the distribution of its motion pictures abroad? A. I am.

Q. Have you made extracts of these contracts? A. That is what I work on, examination and synopsis of the actual contracts.

42 Q. As part of your work have you the various percentages which these foreign contracts call for in payment to the distributors abroad? A. Yes.

Q. Have you a list of these percentages here? A. No, I believe you have them in your papers.

Q. I mean the original list. A. I drew the list up myself.

Q. Have you got a copy of the list which you made up, showing the percentages paid the foreign corporations?

A. That is the typewritten list that, I believe you have in your hands now.

Alfred De Oro, Jr.—for Defendants—Direct.

Q. Have you got a copy of it? A. No, I have not. If you will show it to me I will verify it. 43

Q. Is that a copy of the list which you made up (handing paper to the witness)? A. Yes, that is right.

Q. Can you tell us, please, the percentage of gross receipts which was paid the foreign corporation for distribution in Argentina?

The Witness: The contracts are right here.

Mr. Cohen: Here they are, your Honor, hundreds of them. (Bundle produced.) Does your Honor want us to introduce them in evidence? We will if you want them. May I say this, your Honor? We will give the other side an opportunity to check the rates and if they find any error in the rates given by Mr. De Oro in his testimony— 44

Mr. Raftery: We want to check the contract, and not the rate. We want to know the company and the terms.

The Special Master: I think he is entitled to do that.

Mr. Raftery: Do you want to offer them as one exhibit or mark them for identification?

The Special Master: I don't want to burden the record. I think you should mark them for identification. He has the right to look at the contracts. I don't want to clutter up the record and I don't think he does; but he wants them available. 45

Mr. Cohen: Mr. Raftery, I will let you mark them any way you want, whether as an exhibit or for identification.

The Special Master: Mark them for identification.

(The contracts just referred to were deemed marked Defendants' Exhibit No. 1 for Identification, of this date.)

Alfred De Oro, Jr.—for Defendants—Direct.

46 Q. How many contracts would you say there were in here, Mr. De Oro? A. I should say roughly 200. I took every original contract and put it in that bundle there.

Q. Mr. De Oro, I show you this package and ask you what this package contains (package exhibited to the witness). A. 200 original contracts.

Q. Contracts by whom and with whom? A. By Culver Export Corporation with the several branches in Europe, or rather in the foreign field. (Package opened by the witness.) These are the original contracts.

The Special Master: You have not got a list of the contracts, have you?

47 Mr. Cohen: No.

The Special Master: You are producing for purposes of identification the contracts with foreign distributors, and you will produce a list and let the list be marked for identification, with the assurance that you will produce any of the contracts for further examination.

Mr. Cohen: Certainly.

Mr. Raftery: Correct.

The Special Master: You want to have this witness testify that these are the percentages provided for by these contracts?

48 Mr. Cohen: That is right.

Mr. Raftery: I will stipulate that the witness will testify that he has examined these contracts and has copied these percentages from the contracts and that these are the percentages named in the contracts.

The Special Master: Introduce this as a compilation.

Mr. Cohen: I introduce in evidence a compilation made by Mr. De Oro of the various contracts between Culver Export Corporation and its foreign

Alfred De Oro, Jr.—for Defendants—Direct.

distributors for distribution of the picture "Letty Lynton" and others, for the years 1932-1933, 1933-1934, 1934-1935 and 1935-1936. The figure which has after it the asterisk is the figure which represents the percentage paid the foreign distributor, or the percentage retained by the foreign distributor abroad from gross receipts.

49

Mr. Raftery: What is the figure without an asterisk?

Mr. Cohen: The figure without an asterisk has no relation to the picture "Letty Lynton". It is the rate which was paid in the—take the first country, Argentina; you will see the figure 25 Foreign Version. The foreign version of "Letty Lynton" was not released in Argentina; the regular version was released; therefore, the figure 25 under the regular version has the asterisk.

50

Q. Am I right, Mr. De Oro? A. Right.

By Mr. Raftery:

Q. In other words, in Belgium it was the foreign version and not the regular version? A. Yes, until 1935-1936.

(The compilation headed "Letty Lynton"—"Percentage Retained By Foreign Distributors", was marked Defendants' Exhibit No. 6, of this date.)

51

By Mr. Cohen:

Q. Mr. De Oro, I notice in the list you got up, Defendants' Exhibit 6, that 35 per cent. was retained by the British company for distribution of the picture "Letty Lynton" in Great Britain. Is that right? A. Yes, sir.

Q. Can you tell me, please, whether you know if the 35 per cent. retained by the British company required

Alfred De Oro, Jr.—for Defendants—Direct.

52 the British company to pay for motion picture prints, duties, forwarding charges and expenses of the British office, loss on quota pictures and other such items?

Mr. Raftery: Now, Mr. Cohen, the contract speaks for itself.

Mr. Cohen: This is the only case.

Mr. Raftery: If you want to make a statement in the record that the contract with the British company provides for such and such, please do so.

53 Mr. Cohen: For the purpose of the record, these percentages which are set forth in the statement, in so far as they pertain to Great Britain, require the British company, out of its percentage, to pay for motion picture prints, that is, positive prints, duties, and forwarding charges, administration expenses, the British company expenses, and loss on quota pictures. Do you want testimony as to the loss on quota pictures?

Mr. Raftery: We will both agree that you have a quota loss. The law provides that for every American picture distributed in Great Britain you have to have a certain amount of British footage. Some distribute a quantity of quality British footage and, therefore, have no loss. Some companies buy cheap British footage and have a loss because they can't get any revenue for it, but buy it to comply with the law. That is the principle.

54 Mr. Cohen: Except that I don't know any British pictures on which any of them make any money.

Mr. Raftery: You are not familiar with the United Artists pictures.

Mr. Cohen: They are an exception. I also want a stipulation on the record, Mr. Raftery, that the British quota requires that one, I think, out of every five motion pictures distributed should be a British picture.

Maurice Brunet—for Defendants—Direct.

Mr. Raftery: Whatever the law is I will stipulate it. We will furnish Mr. Auchincloss with an extract of the law. 55

Mr. Cohen: All right. That is all for this witness at this time.

MAURICE BRUNET, of 892 Elm Avenue, Ridgefield, New Jersey, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. Mr. Brunet, what is your occupation, please? A. I am in charge of the tax accounts of Columbia Pictures Corporation. 56

Q. Of Columbia Pictures Corporation? A. Yes.

Q. That is a company engaged in producing motion pictures? A. That is a company engaged in producing motion pictures.

Q. Does Columbia Pictures Corporation distribute in foreign territory? A. They do.

Q. How long have you been connected with Columbia Pictures Corporation? A. Four years.

Q. And prior to that what was your occupation? A. I was connected with three other motion picture companies for a period of over sixteen years. 57

Q. What were those companies? A. Pathe Exchange, R-K-O and Educational Pictures.

Q. How long were you with Pathe, and the period? A. I was with Pathe over fifteen years, being back from 1917 to about the beginning of 1931—it was—

Mr. Raftery: We concede that the witness has been in the motion picture business for a great many years.

Maurice Brunet—for Defendants—Direct.

58 Q. After Pathe with what company were you connected?

A. R-K-O.

Q. That is Radio-Keith-Orpheum? A. Yes.

Q. In what capacity? A. In the capacity of tax man.

Q. For how long a period? A. For a period about a year and a half, or rather, a year, I should say.

Q. Then with what company were you? A. Educational Pictures Corporation.

Q. In what capacity? A. In the capacity of general auditor.

Q. For how long a period? A. For about fourteen months.

59 Q. In these various capacities have you acquired knowledge of the percentages paid for foreign distribution of motion pictures? A. I have.

Q. For each of these companies you mentioned? A. For the three companies I mentioned; four companies, I should say.

Q. Have you had before you Defendants' Exhibit 6? A. I had a copy of it.

Q. I ask you to look at these percentages and tell us whether or not each of the percentages paid was reasonable and fair?

60

Mr. Cohen: If your Honor will recall, at the last session you wanted some testimony as to the reasonableness of the charges and the fairness of the set-up, and your Honor made the statement that your Honor thought that since the complainants are seeking to recover profits they will have to stand the expense which was incurred in producing these profits.

The Special Master: I don't think the testimony is very helpful. You said you have made these payments. How can this witness testify that those are reasonable payments, without discussing the situation in each of those countries?

Maurice Brunet—for Defendants—Direct.

Mr. Cohen: We shall have it discussed.

61

The Special Master: I am inclined to let any testimony in that you want to put in until I find out more about what the case is about. But take Chile; what did you give them? 30 per cent.; you actually paid them 30 per cent., you say. Can he testify whether under the circumstances existing in Chile that was a fair cost or not?

Mr. Cohen: From the experience of his own companies.

The Special Master: You go ahead and prove it the way you want, and we will see how relative it is.

62

Mr. Raftery: Then I reserve my right to strike out.

Q. Let us start with the first country on the list, Argentina. For the season 1932-1933 you will notice that the Argentina corporation retained 25 per cent. of the gross receipts. For the year 1933-1934 it retained 30 per cent., and then each of the subsequent years it retained 30 per cent. Can you tell us whether that was a fair and reasonable percentage which the Argentina corporation retained from the gross receipts for the distribution of the picture in Argentina? A. From my past experience with motion pictures, there were some of them dealing in the territory on an out and out sales basis or on a percentage agreement basis. This percentage is below the amount that those companies had to concede to franchise holders in that territory. One company that I have been connected with has opened exchanges out there since 1932. In that territory I can safely say that the percentage allowed to that company for operation has been in excess of the figures which was taken here. As a matter of record I will say 40 per cent.

63

Q. Let us take the next country. Take Australia. There

Maurice Brunet—for Defendants—Direct.

64 was a uniform percentage allowed the Australian company of 40 per cent. for each of the years that the picture "Letty Lynton" was distributed in Australia. Is that a fair and reasonable percentage? A. In Australia the percentage seemed to be equal to the contract we have been having in the past with companies or franchise holders that were in business in those days and no more in business, and some of them that were in business have been taken over by one of the companies I have been working for. It was the same percentage. There wasn't any difference whatsoever in that territory.

Q: Austria, we seem to have paid 40 per cent. of the gross receipts to the foreign corporation. What would you say as to that figure? A. Let me make a statement about Austria. My experience in that territory is not of the same nature as yours. You seem to have dealt with people or companies that retained 40 per cent. as cost of operation. I have not been so fortunate because I had no direct contact with that territory; we had to sell outright to franchise holders. Now, I don't have to tell these gentlemen here that outright sales in foreign territories are at a minimum return you could expect from the exploitation of a picture. When you have to deal on an outright sales basis you are not getting a fair deal. You take that because you would rather take that than take nothing.

66 When you are dealing with a corporation of your own or with someone who gives you a percentage agreement, then I suppose 40 per cent. retained by that distributor would give you a better break than the results you get from outright sales. I am sure you will agree with me on that.

Mr. Raftery: I think so.

Mr. Cohen: Do you agree, Mr. Raftery?

Mr. Raftery: I agree that if you sell a picture outright in a territory you get a flat fee for it.

Maurice Brunet—for Defendants—Direct.

Mr. Cohen: It is not as good—

67

Mr. Raftery: It is not as good as if you operate your own exchanges. I agree with that in principle.

Q. The next country is Belgium. There we seem to have distributed the foreign version of "Letty Lynton" and in 1932-1933 the Belgium company retained 15 per cent., likewise 15 per cent. in 1933-1934, and 25 per cent. in each of the years 1934-1935 and 1935-1936. What would you say as to the percentages just mentioned, as to their reasonableness? A. The best break that I remember in that territory has been some higher, when we received 65 per cent. of the gross and 35 per cent. was retained by the franchise holder in Belgium. I may state that maybe that the 25 per cent. that your company has retained out there is a fair figure compared with the 35 per cent. that we had to stand as the cost of distribution, because in that territory—

68

By Mr. Raftery:

Q. In other words, your company had to pay 35 per cent.? A. Yes, we had to deal—we were not getting 35 per cent., but the best we got was 35 per cent.

By Mr. Cohen:

69

Q. There were cases where you did not get 35 per cent.? A. 50-50; that is way back in 1932 and 1933. It is not existing since that time. Since that time that has been reduced to 35.

Q. Take the next, the British West Indies. We seem to have allowed 25 per cent. in 1933-1934, 45 per cent. in 1934-1935 and a percentage of 40 in 1935-1936. A. In that territory I will have to make the same statement that I made in connection with Austria. We have dealt on an outright sales basis in that territory.

Maurice Brunet—for Defendants—Direct.

70 Q. What was your return on this outright sales basis?

A. We have not received the break you would receive for a percentage distribution.

Q. So that you say that the percentages paid for British West Indies distribution are fair and reasonable? A. It was fair and reasonable and better than an outright deal in that territory.

Q. In Brazil there seems to be a percentage of 30 for each of the years in which "Letty Lynton" was distributed in that country. Would you consider that fair and reasonable?

71 Mr. Raftery: Mr. Cohen, we feel that we can save time. Without admitting the competency or relevancy of his testimony or the materiality of it, we will concede that this witness will testify substantially the same to all of the territories mentioned on here as he has testified to the territories above.

The Special Master: If he does, it would justify a finding that the charges were entirely reasonable.

Mr. Raftery: I will cross examine him after making the concession.

The Special Master: You may go ahead and cross examine, and if Mr. Cohen is not satisfied he may continue his direct examination.

72 Mr. Raftery: So that you do not misunderstand my concession, I am merely conceding that the witness will testify substantially similar to the balance of the countries as he has testified to the countries above.

Mr. Cohen: I can't find any fault with you for that.

The Special Master: Unless he is shaken by your cross examination, that would justify a finding, provided the finding is material, that the charges here were entirely reasonable. Isn't that so?

Maurice Brunet—for Defendants—Direct.

Mr. Raftery: No. I am merely saying that he will so testify. 73

The Special Master: I understand that.

Mr. Raftery: Then we still could offer evidence, if we wanted to, that the charges were unreasonable.

The Special Master: Oh, certainly; but in the absence of any attack, that would justify the finding I describe.

Mr. Raftery: Oh, yes.

The Special Master: Do you want to cross-examine him?

Mr. Raftery: Unless the witness wants to make some statement that there is some country here that he does not know about. 74

The Witness: There are some them that I have no record of because I did not deal in those territories but they are minor territories, I should say. When it comes to Germany, right now the information that I could give you would be more or less from my memory, because we are not dealing in Germany. Most companies have pulled out of Germany. But you have other cases, like in Greece, for instance, where your dealings are limited that whatever I would say, even if it was a percentage similar to yours or smaller, has really not much value on the whole thing because it receives such a small proportion of the total business done. 75

Q. Greece is a 30 per cent. country; but you have no knowledge as to the conditions in Greece? A. No, I would not want to make a statement that I would have answered as to all the countries.

Q. Mr. Brunet, I wonder if you could let us have the benefit of your experience in the motion picture business and describe to us the conditions which prevailed in the motion picture industry in so far as they related to the

Maurice Bruet—For Defendants—Direct.

76 foreign field prior to the organization of the foreign distributing companies by the various motion picture companies. A. I would be glad to do so. Way back to the war days—

Q. Which war? A. I would say the Great War—the distribution of pictures in foreign territory was more or less limited. There were very few companies that were doing great business in foreign fields. One of the biggest chain of distributors in foreign fields was run by a French company by the name of Pathe Cinema and they had their offices practically all over the world, or they were all scattered. There were about ten offices, and when you wanted to make a deal in the South American field you had to deal with two or three franchise holders, one in Brazil and one in Argentina and Chile. Now, the distribution was of course very small and brought poor return to the originating companies because of the fact that you had to deal through so very few in order to get your contract. I remember the days when we were selling our rights for the entire world for a flat amount.

Q. Approximately what was that amount? A. The average amount of the foreign business never exceeded 15 per cent. of your total gross, the world gross. In other words, in the foreign field you were getting about 15 per cent. of your total world business.

78 The situation lasted for several years, when the American companies found out they were not getting a fair return, and engineered some new deals. Some of the deals were made and were based on the percentage of the total cost of the negative, applied to a certain territory. In other words, if a picture cost the American company \$100,000, they would, for instance, allocate ten per cent. to the British territory and would make a deal with the franchise holder to pay ten per cent. of any picture they would make during the year, and whatever the cost was, if it was \$100,000 it was \$10,000; if it was \$200,000 it was \$20,000.

Maurice Brunet—for Defendants—Direct.

Q. In other words, the British franchise holder would obligate himself to pay you \$10,000, being ten per cent. of the cost of making the picture? A. That is right. 79

Q. Continue, Mr. Brunet. A. The next step of the motion picture company was to try to get a fair deal with the franchise holders and to sell them the products on a percentage basis, the franchise holder to retain a portion of the gross, and from your share they would retain whatever expense they had to sustain for the making of positive prints, the expenses of duties, et cetera, and then, considering the transaction has resulted in a profit and will give you a further split, would split 50-50 with the American companies. 80

That method also left more net income to the American companies, but really did not give them yet a fair return. It was as the result of all those contracts which were unsatisfactory to the American companies that the American companies decided that rather than have their business run for them at a distance of three or four thousand miles from the home office, to take care of the distribution of their products out there in the foreign territory. They found it more beneficial, for two reasons; first, that they were attending to selling their own products, and secondly, they could operate more efficiently than the franchise holders were doing because the franchise holders more or less were working for a commission while the American companies were working for a commission but also to try to come back to the American company with a fair and reasonable return on their initial investment. 81

That is the situation now. Many American companies have installed their offices; and if I may refer back to the percentage sheet showing the percentages allowed to those various foreign corporations, to my estimation they are fair and reasonable, and I would even say this in proof of it, that by looking over some figures of the company—

Q. What company? A. I don't know if I should men-

MICRO CARD

TRADE

MARK



22

39

1409



65



Maurice Brunet—for Defendants—Direct.

82 tion any company here, because I think it is not a party here. In looking over the company I am presently employed by I would say that their average distribution cost in foreign territories, on the foreign gross income of over \$6,891,000, was \$2,359,000, which would seem to indicate that the cost of foreign operation was slightly under 34 per cent. All the charges are absorbed by the American Company; none of those charges are absorbed by the foreign corporations. So it means that the 34 per cent. really represents an average cost to the American companies for the distribution of its product abroad.

83 That 34 per cent. covers every kind of contract that we have made. As a matter of fact, as I said before, it represents an average sum of money retained from the gross to operate in foreign territory.

Q. Now, Mr. Brunet, what would you say of a gross income in the foreign territory of \$435,266.64 and a retention out of that sum of \$150,894.42 by the foreign corporations, taking into consideration also the fact that in the case of England the English company paid out of its retention the cost of prints, duties, censorship, administration expenses, loss on quota pictures, forwarding charges, et cetera? A. In order to make a right comparison between your statement and the statement I made before, I would have to put our figures on the same basis as the basis you mentioned to me. In other words, we would have to add 84 to our distribution cost the cost of positive prints, duties, forwarding charges, and so forth, that our company in England does not sustain now but that your company in England sustains.

I worked up some figures here and I found out that the British print cost would increase the distribution cost of our product in Great Britain by ten per cent. In other words, that our figures, stated as being 34 and a fraction per cent., would be raised by a considerable figure which may reach as an average basis 38 or 39 or 40 per cent.

Maurice Brunet—for Defendants—Cross.

That would place the figures on the same basis as your own. 85

If I can visualize your figures as you state them right now, it would seem to me that your percentage of distribution down there is below 35 per cent., isn't it?

Q. Considerably. (Paper handed to the witness.) A. So for the purpose of comparison it would make it less than 35 per cent.; 34 and a fraction.

Q. Out of which the British company, of course, pays its own print cost and so forth? A. So if we use the same method and add the cost of prints of the British company to the cost of its operation, which are now exclusive of the cost of prints, I would say as a matter of comparison our company would operate in the foreign field on a basis of 48 or 49 per cent. against your 34 and a fraction per cent. 86

Q. In Great Britain isn't our percentage considerably less than 34 per cent.?

Mr. Raftery: Now we are arguing. The figures speak for themselves.

The Special Master: You have made your point.

Mr. Cohen: Are there any questions that your Honor would like to ask Mr. Brunet, covering his past experiences?

The Special Master: Not now. 87

Cross examination by Mr. Raftery:

Q. Mr. Brunet, so as to clear up a part of your explanation of the evolution of the business, what I understand is that the American companies or companies that you were associated with, first made outright sales in territories other than the United States; is that right? A. That is right.

Q. Those outright sales were generally made for a cash

Maurice Brunet—for Defendants—Cross.

88 consideration to third persons who had no association with your company, as a general rule? A. Not all the time.

Q. As a general rule? A. As a general rule.

Q. In the early days? A. In the early days.

Q. Then at a later date, instead of making an outright sale it made an arrangement with the franchise holder, as you call them, ~~who acted as a distributing agent in the foreign territory~~; is that right? A. That is right.

Q. And this franchise holder, as a rule, was some third person, firm or corporation that was in association other than by contract with your American company? A. In some cases that is right.

89 Q. And at a later date these companies decided to open their own branches in these foreign territories, through subsidiary corporations? A. They did, yes, in certain particulars.

Q. Let us take Columbia; that is your present affiliation, is it not? A. Yes.

Q. Columbia formerly distributed in England through the United Artists? A. That is right.

Q. The United Artists Corporation, Limited, I think the name is? A. Yes.

Q. It distributed Columbia Pictures Corporation products in the territory for several years, for a percentage of the gross receipts? A. Yes.

90 Q. Do you remember the percentage? A. Yes.

Q. What was it? A. Twenty-five.

Q. Twenty-five per cent.? A. Yes.

Q. That was for the British Isles and the islands adjacent thereto? A. Yes.

Q. Now, at some date in 1934 or 1933 Columbia decided to open its own branch in London? A. Yes.

Q. Now, in setting up your figures on distribution through these foreign subsidiaries you kept a record on the actual cost of distribution in each foreign territory, did you not? A. I did.

Maurice Brunet—for Defendants—Cross.

Q. In other words, even though its contract with the subsidiary says 35 per cent. to the subsidiary, you know exactly what it costs that subsidiary to distribute over any given year? A. Yes, I do.

91

Q. And the difference between what that subsidiary charges and what the actual cost is is the profit of that subsidiary? A. Correct.

Q. That subsidiary in turn transmits that profit to your home office? A. Eventually.

Q. So that we have two figures of distribution now in each foreign territory, first, the figure charged by the subsidiary; is that right? A. Yes.

Q. And then the actual cost of distribution in the territory? A. That is a matter of argument.

92

Q. It is a fact. So that when you have been talking about franchise holders in these territories at the present time as a general rule you are talking about subsidiaries of your Columbia company? A. In certain places. You know we do not cover all the territory.

Q. You don't distribute yourself in Canada, do you? A. No, we do not, or in South Africa where there is a great deal of business coming from.

Q. When you gave your testimony as to the reasonableness of your charges you did not want the Special Master to think that it actually cost that amount of money to distribute this particular picture in any of these particular territories? A. No, because I was just answering the questions which appeared on the top of these statements, which says "Percentage retained by foreign distributors". Mr. Raftery, maybe I could make a little statement in regard to a remark you passed about the old contracts that we had with United Artists in England, where you mentioned the percentages were 25. May I say, as you well know, that the 25 per cent. the United Artists received in England was only part of their profit from the exploitation of the Columbia pictures in England.

93

Mr. Raftery: That is right. That is all.

Jacques Van Straten—for Defendants—Direct.

94 Re-direct examination by Mr. Cohen:

Q. Do I understand that in addition to the 25 per cent. that a further charge was made? A. There were indirect profits realized by United Artists, which I do not think it is worth while discussing just now, because Mr. Raftery knows very well what they are.

Mr. Raftery: That is all.

Mr. Cohen: That is all for this witness.

95 JACQUES VAN STRATEN, of 284 Eastern Parkway, Brooklyn, New York, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. What is your occupation? A. Accountant and auditor.

Q. For whom? A. Loew's Inc.

Q. How long have you been so employed? A. Ten years about, maybe a little more.

Q. Do you know how many foreign versions were made of the motion picture "Letty Lynton"? A. Yes, I do.

96 Q. Will you state them? A. English, that is the original; Spanish, French, Italian and German.

Q. There were four in addition to the English? A. Right.

Q. Have you got the costs on the Spanish version? A. I have.

Q. Have you got the records? A. I have.

Q. Will you produce them, please? (Papers produced by witness.) In what country was the Spanish version produced? A. Spain.

Q. And the other versions, where were they made? A. At the Coast in California, Culver City.

HEARING OF FEBRUARY 1, 1937.

97

Mr. Driscoll: My suggestion is to start taking the testimony in Los Angeles on Monday, March first, four weeks from today. It will give us an opportunity to rearrange our affairs again as we did before, and prepare to go out there.

Mr. Cohen: Will that be agreeable to you, Mr. Special Master?

The Special Master: It is about as agreeable as any other date.

Mr. Driscoll: Are you going to offer any evidence today?

Mr. Cohen: I would like to have these bundles marked for identification, for the time being. They are the original reports from foreign corporations. There are 19 bundles of records, which are the original reports received from the foreign corporations, showing gross receipts, throughout the world, with the exception of the United States and Canada, of the motion picture "Letty Lynton" showing also the percentage retained by the foreign distributing corporations, from which records the defendants prepared Defendants' Exhibit 6.

98

(The bundles of records just referred to were marked Defendants' Exhibit No. 3 for Identification, of this date.)

99

It is stipulated that these records may be taken back to the offices of the Metro-Goldwyn, to be open there to the inspection of the Plaintiffs' representatives.

(Hearing adjourned, subject to the call of the Special Master.)

Culver City Hearings.

[SAME TITLE.]

Proceedings had at Metro-Goldwyn-Mayer Studios, Culver City, California, March 1, 1937 to March 8, 1937, inclusive, commencing at 10:30 o'clock A. M., March 1, 1937, before Gordon Auchincloss, Esq., Special Master.

APPEARANCES OF COUNSEL:

J. ROBERT RUBIN, ESQ., by Samuel D. Cohen Esq., and Walter H. Pollak, of counsel.

LOEB, WALKER & LOEB, ESQS., by Milton H. Schwartz and Walter S. Hilborn, Esqs., for defendants.

O'BRIEN, DRISCOLL & RAFTERY, ESQS., by Arthur F. Driscoll, Esq., for complainants.

Special Master Auchincloss: Proceed, gentlemen.

Mr. Pollak: As I told you, Special Master Auchincloss, and Mr. Driscoll, before coming out here, what seemed to me the most effective way of making a succinct presentation of what we desire is to have an adjournment of two or three days, if that is agreeable to both of you. I find that Mr. Cohen, whom you all know, and Mr. Schwartz and Mr. Hilborn, whom you will know, have done a beautiful job of presentation, so beautiful that I think it should be made a little more beautiful and can be made a little more comprehensive if we could be permitted to have an adjournment of three days. We suggest that so that in the interval, Mr. Prager can look over the books, which I understand he wishes to do, and I imagine, from gazing at the

Colloquy of Counsel.

mere magnitude of those books, Mr. Prager can be well employed, even with his experience, but everything will be made easy for him. The other thing I wanted to say, Mr. Archincloss, is this: I think it is desirable to have a simple statement of just what, in our view, the evidence out here will be concerned with. It will, of course, be concerned with specific accounting, but the evidence that we are going to introduce, besides accounting evidence pure and simple, besides figures and computations, will also be evidence directed to making clear for the record the actual organization of the great enterprise that you see about you. That evidence will, of course, have bearing upon the accounting, pure and simple. It will show the nature of the effort which the expense items represent. That evidence, I want to make clear at this point, will also have, in our view, a separate and substantive significance of the highest importance in relation to the major, underlying issue in this case, an issue that, as everybody knows, is singularly bereft of clear authority.

That issue is the issue of what, as a matter of law in the case of infringement—and so far as there is judicial determination that cannot be changed unless and until the case reaches the Supreme Court of the United States—the issue is, assuming infringement, what in the case of the infringement of written work by a motion picture production is the measure of recovery? The question is as to the great composite which is the ultimate creation, and I use the word "creation" with deliberation—and what share of that great composite that the motion picture production represents is the share that the plaintiffs have contributed? What is the share that the defendants have contributed? That is a problem of law. If

103

104

105

Colloquy of Counsel

106 is a problem of law that in this case can be presented upon facts which show the nature of the contribution of the defendants as well as of the plaintiffs. The general nature of the plaintiffs' contribution is clear enough. It is a play the plaintiffs have written. The nature of the defendants' contribution can only become plain after it is demonstrated partly visually through your inspection, partly in question and answer form for the record, what the general quality of motion picture production is, and we propose, if your Honor please, to prove that in both ways: By inspection at your convenience and, of course, in the presence of counsel on both sides, of the premises whenever you wish, and whenever it is convenient to both sides, and also by testimony for the record that can be preserved for other courts.

107 I have said one word about the general nature of the defendants' contribution, which is what we are here to prove. Having said a word about the nature of the defendants' contribution, and because my only purpose in saying anything is to make clear to you just what we feel the issues at this stage are, and increasingly from now on are going to be, I want to say one word about the nature of the plaintiffs' contribution, though it is obviously a matter that will best have exposition at the close of the hearing, of all the hearings, and upon the submission of briefs.

108 In this particular instance, what the plaintiffs have done is to take a theme that was in the public domain, to improve that theme, improve it to the extent of having, as the court has adjudged, a copyrightable interest in the improvement, but still, simply to improve. This is no case of Dickens' writing a novel, of Swinburne's writing a poem,

Colloquy of Counsel.

and of absolutely fresh creation of the plaintiffs' part. This is a case, avowedly, of the development by plaintiffs, acknowledgeably of the defendants by plaintiffs of a theme that had been a part of the literature of the English-speaking peoples for about three generations and ultimately what we will get down to, in our view, and I am saying this now not, of course, trying to demonstrate it, but simply to give a lead to your Honor's thought to show what it is we are setting out to do and what we believe the evidence and the ultimate argumentation will demonstrate, what I am trying to make clear to your Honor is this: Our ultimate and inclusive proposition in this, that of the composite whole, the creation which the motion picture play was and is, the contribution of the defendants is immense. The contribution of the plaintiffs is a fraction only of the written work which, itself, is a small fraction of the total product. That is all I want to take up your time with at this time. Would it be convenient to have an adjournment until Thursday, Mr. Driscoll? 109 110

Mr. Driscoll: I just want to answer—

Mr. Pollak: Oh, yes, of course.

Mr. Driscoll: —Mr. Pollak. There isn't any such issue before you here at all. It is just too bad that Walter Pollak didn't try the case originally in the Federal Court, or handle the appeal; if he had, all of these things might have been important. But they are certainly not important here. It is just simply a case, if we follow out his indicated course of action, of trying the issues of this action all over again, and that is not what we are here for at all. 111

It is a matter of general knowledge that there is nothing new under the sun. Nobody in the world that knows anything about it would say that Edward

Colloquy of Counsel.

Sheldon and Mrs. Barnes conceived of something that had never been thought of before. That isn't the copyright law. They wrote a play that was a new one, an original play. The theme, of course, had been done before. There isn't anything in the world that hasn't been done before. But be that as it may, even though it hadn't been done before, or had been done before, the question is not before us. There is an order here that was made by the Federal Court referring to you, Mr. Special Master, as Special Master to ascertain and report the amount of complainants' damages herein and the amount of gains and profits of the defendants, and each of them, and, in addition, the Special Master shall report separately the amounts of such gains and profits as the defendants obtained from all sources outside of the United States, and that the complainants on such accounting have a right to examination, and so forth. So there is only one issue here. There is only one thing for you to determine, and that is the amount of profits made by the defendants with this picture. You have no cause at all to look over the plant and say what they have contributed. You have no cause at all to say what they put into this picture. You are definitely ordered by the court to find out what the profits on this picture are, and nothing else at all. We are not trying the issues of this action all over again. They have been tried and determined, and that is the situation. That is the thing we are here for.

Mr. Pollak: How about the inspection of the place, where would you care to do that, and in what circumstances?

Mr. Driscoll: Well, if this is part of the general inspection, I have no objection to the Special Master inspecting the place. In fact I would like to in-

Colloquy of Counsel.

spect it myself. I think it would be very pleasant, 115
but if it is part of this judicial hearing, then I
am going to record my objection right here.

Special Master Auchincloss: It isn't going to be
part of the judicial hearing. The only purpose of
having the inspection of the place is to make the
testimony more intelligible to counsel and to the
Special Master.

Mr. Pollak: That is correct. I think the record
should show, don't you, as a matter of orderly pro-
cedure, that you have inspected it?

Special Master Auchincloss: Yes, that is all right.

Mr. Driscoll: Then I want to record an objec- 116
tion on the ground that it has nothing whatsoever
to do with determining the receipts and expendi-
tures or profits of this picture.

Special Master Auchincloss: That is all right,
but we are only doing it, as far as I am concerned,
so as to be a little bit more intelligent when you
start in presenting your case.

Mr. Driscoll: We will meet, then, at 10:30?

Special Master Auchincloss: 10:30 Wednesday.

(Whereupon, at 11:15 o'clock A. M., the hearing
was continued and adjourned until 10:30 o'clock
A. M., Wednesday, March 3, 1937.)

HEARING OF MARCH 3, 1937

118

(At the hour of 10:30 o'clock A. M., Wednesday, March 3, 1937, the hearing was resumed, all parties being present.)

Mr. Hilborn: Mr. Craig, will you take the stand, please?

WILLARD K. CRAIG, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Hilborn:

Q. State your full name, please. A. Willard K. Craig.

119

Q. Where do you reside, Mr. Craig? A. 48 South Oakhurst Drive, Beverly Hills.

Q. And what is your official position with Metro-Goldwyn-Mayer Corporation? A. Auditor.

Q. And for how long a period of time have you been auditor? A. For Metro-Goldwyn-Mayer Corporation since 1924.

120

Q. Will you tell the Master your prior experience as an auditor? A. I was Chief Accountant for the United States Reclamation Service on the Salt River Project from 1914 to 1916. I was Assistant Examiner of Accounts for the United States Reclamation Service in 1918 and '19. For six months in the early part of 1920 I was Office Manager and head of the Accounting Division for the Salt River Valley Water Users Association at Phoenix, Arizona. For a year and a half, beginning in the middle of 1920, through 1921, I was auditor for the Universal Film Manufacturing Studios at Universal City. In January, 1922, I went to the Standard Film Laboratories who were opening their plant in Hollywood and opened their accounts, and was there for six months, approximately. In May, 1922, I went to Metro Pictures Corporation as auditor, and I have been in that position ever since coming over to Metro-Goldwyn-Mayer Corporation in 1924.

Willard K. Craig—for Defendants—Direct.

Q. Can you tell the Master how many persons are in your department and under your supervision? A. At the present time I have some 95. 121

Q. Now, Mr. Craig, the accounting which has been in evidence here, the amended accounting, is in two classifications. One is called Completed Negative Cost (referring to Defendants' Exhibits 18-D1 to 18-D4), and the other is called Studio Overhead (referring to Exhibits 18-D5, 18-E1 and 18-E2). In the accounting called Completed Negative Cost there is in each, or in the most, of the department classifications, an item of Department Overhead. Will you explain to the Master the basis and the method upon which that computation is made? A. May I take one department and use it as an illustration? 122

Q. Yes.

Mr. Driscoll: Why not take this first one that we are questioning?

Mr. Hilborn: The Camera Department (referring to Defendants' Exhibit 18-D1)?

Mr. Driscoll: The Camera Department.

The Witness: That is what I was going to suggest. In that department we have the head of the department who is designated as Head of Photography, his office staff, and also the maintenance and repairs of cameras and other incidental expenses which cannot be directly allocated to production. Those accounts are collected in a departmental group of overhead accounts. We have felt that the most practical way to distribute that, instead of dumping it into a general overhead pot, is to distribute it on the basis of the direct cameraman's work on the picture, and in order to arrive at a working percentage on that, we have taken our experience in the previous fiscal year and, say, for the sake of illustration, that the departmental overhead is 10 per cent. of the direct salaries of 123

Willard K. Craig—for Defendants—Direct.

cameramen. In the succeeding year we use that percentage as a basis for absorbing our Camera Department overhead. The same practice we endeavor to follow wherever practical through the departmental accounts.

By Mr. Hilborn:

Q. Now, in the Camera Department, Mr. Craig, what was the base, the proportion of overhead that you used to determine the amount of department overhead in the Camera Department that was charged to this particular picture? A. You mean the percentage?

Q. Yes, the percentage. A. Well, I am sorry, I have just sent down for it.

Q. If I show you a weekly computation, Mr. Craig, will that help you? A. In that year we were using a 10 per cent. figure—no 25 per cent.; pardon me—25 per cent.

Q. In other words, you charged directly into the picture as overhead of the Camera Department, 25 per cent. of the wages of the men who actually worked on the picture in the Camera Department?

By Mr. Hilborn:

Q. What was the total charge for wages of cameramen on the picture Letty Lynton? A. \$4,185.63.

Q. And the department overhead charges in the Camera Department? A. It was \$1,045.17.

Q. Which is 25 per cent. of the cameramen's wages? A. That is right.

Q. By the way, tell us what the fiscal year was in which Letty Lynton was produced. A. It was made in the fiscal year ending August 24, 1932. That is the studio fiscal year which differs a few days from the fiscal year, because they allow us to close on the week ending nearest the last of August.

Willard K. Craig—for Defendants—Direct.

Q. Can you tell us now what the total cost of operating the Camera Department was in that year? A. The total cost for operating the Camera Department in the fiscal year ending August 24, 1932, was \$68,191.81. 127

Q. And how much of that was absorbed in the picture in the method which you have described? A. Absorbed in the picture in the method that I have described, \$58,410.29.

Q. Leaving unabsorbed how much, Mr. Craig? A. Unabsorbed, \$9,781.52.

Q. And that amount appears as a charge to general studio overhead on Schedule A-2 (Defendants' Exhibit 18-E2)? A. That is correct.

Q. That is a debit item of charges in the overhead of the unabsorbed studio Camera Department overhead? A. Yes. 128

By Mr. Hilborn:

Q. Were these books kept in the usual course of your business in this method you have now described? A. Yes, they were.

Q. Now, the method which you have described for charging departmental overhead into the picture prevailed over many of the departments? A. That is correct.

Q. And the only difference from department to department is the percentage which was used? A. In most cases, yes. 129

Q. Mr. Craig, you have used the phrase "absorbed and unabsorbed overhead." Will you explain to the Master what you mean by those phrases? A. Well, if at a given period the charges in the department exceed the amount that we have charged out to pictures, the balance will be unabsorbed overhead. If the credits or the amounts that we have charged to pictures exceed the amount of the departmental cost, the balance will be over-absorbed.

Willard K. Craig—for Defendants—Direct.

130 Q. And what disposition is made of unabsorbed overhead, Mr. Craig? A. At the end of the fiscal year it is applied as an additional charge to general studio overhead.

Q. And what disposition is made of over-absorbed overhead? A. It is applied as a credit to the general studio overhead.

Q. Mr. Craig, the same 25 per cent. was charged in each picture. I mean the same system was used for each picture that was produced by the studio during this year, charging 25 per cent. of the direct camera cost as department overhead? A. That was true, with the exception of the Cosmopolitan Pictures, which were made under a special contract.

131

By Mr. Hilborn:

Q. Mr. Craig, the same system was used with the proportionate department overhead for editors and cutters, was it not? A. That is correct.

Q. I show you a journal entry for editors and cutters for the week ending February 24, 1932, and ask you if you can tell us what proportion of the direct cost in that department was added for department overhead? A. There was added 8 per cent.

132 Q. And in what method did you determine the factor of 8 per cent. as added cost for the department overhead?

A. It was determined on the basis of the experience of that department for the fiscal year that ended in August, 1931, the previous fiscal year's basis.

The Witness: That is right. In other words, in this particular period we were unabsorbed as a result of the use of our 8 per cent. The same method was used in the prior year, but I thought I had the figures here.

Willard K. Craig—for Defendants—Direct.

By Mr. Hilborn:

133

Q. To what extent was the overhead of this department unabsorbed in this fiscal year, Mr. Craig?

The Witness: \$11,841.67.

By Mr. Hilborn:

Q. And does that amount appear as the debit in the account of general studio overhead, Schedule A-2 (Defendants' Exhibit 18-E2)? A. Yes, sir, it does.

Q. Now, the total aggregate charges for overhead of the editors and cutters for the picture Letty Lynton was \$221.57? A. \$221.57.

134

Q. That is the aggregate of the weekly charges, according to the journal sheets, which were made contemporaneously from week to week? A. Yes, sir.

Q. The next item, Mr. Craig, is the salary of Joan Crawford. Can you tell us what Joan Crawford's salary was at this time? By the way, who was Joan Crawford, Mr. Craig?

The Witness: Miss Crawford is an artist under contract to Metro-Goldwyn-Mayer Corporation. She was the feminine lead of Letty Lynton.

By Mr. Hilborn:

135

Q. What was her contract salary during the period of Letty Lynton? A. (Examining file.) I am sorry for the delay, but there was a change of salary rate on the 30th of March. I was just checking to see if that fell within the period that she was on the picture. Her contract rate when the picture started was \$3,000.00 per week.

Q. And can you tell from that to what extent Joan Crawford worked on this picture? A. Joan Crawford started on the picture on February 24, 1932.

Willard K. Craig—for Defendants—Direct.

Q. And worked how long, Mr. Craig? A. She was finished in regular production on March 28th. She started to make retakes on April 1st, and finished retakes on April 4th. She made another retake on April 12th, and that, I believe, was all.

Q. Mr. Driscoll: What?

The Witness: The last retake was on April 12th, according to my record here.

Q. Now, in addition to these amounts, Mr. Craig, Miss Crawford received some compensation for the period prior to February 24th, which was charged into this picture, did she not? A. That is correct.

Q. And that is included in it? A. That is correct.

Q. What was that for, Mr. Craig? A. There was a 5-day period between the finish of her previous picture and the day she started in Letty Lynton, for which she was being paid salary, \$500.00 a day. Do you want me to explain that?

Q. Yes. A. Under the studio policy, with stars who are designated, important people such as Joan Crawford and Robert Montgomery—well, may I start back a little further. The stars of Crawford's type are employed on a yearly contract basis with a 40-week guarantee, and during the time that they are not actually engaged in shooting a picture, part of this 40-week guarantee has to be paid as idle time on the records in the studio, so for that star, the accumulated salary between productions is charged to the succeeding production. That was the case with Miss Crawford.

Q. So that the figure of eighteen thousand and some dollars that was paid to Miss Crawford, in that figure there was some idle time?

The Witness: Well, I see, it is \$2,000.00.

Willard K. Craig—for Defendants—Direct.

By Mr. Hilborn:

139

Q. \$2,000.00 idle time? A. You take up the \$2500.00, and she started here a day back, that makes it \$2,000.00.

Q. That was the general practice in the studio with reference to charging the idle time of stars, wasn't it, Mr. Craig?

Mr. Driscoll: Objected to as immaterial.

The Witness: Yes, it was.

Special Master Auchincloss: I think it ought to stand as to what you did in this particular case.

Mr. Pollak: We have a right, I think, Mr. Master, to show the general practice of the studio. The problem here is one of allocation among different performers.

140

Special Master Auchincloss: We will let it go in for what it is worth.

By Mr. Hilborn:

Q. This charge was contemporaneously made, Mr. Craig? A. Yes, sir, it was.

Q. Now, with reference to Robert Montgomery, did you have a contract with him? A. We did.

Q. And at what salary? A. Montgomery was being paid \$2500.00 a week.

141

Q. Was that pursuant to a written contract? A. Yes, sir.

Q. And can you tell how much, do you know how much of the \$10,000.02, if any, was idle time? A. In Montgomery's case there was \$2500.00 idle time.

Q. And the balance was paid to him for actual work on this picture? A. That is correct.

Q. Will you tell the Master what a retake is, Mr. Craig? A. As the picture is being shot according to schedule, they come to the close of their schedule and they have

Willard K. Craig—for Defendants—Direct.

142 taken all the scenes called for in the script, or all that they have desired or essential, and they will close the regular production. Now, after they have cut the picture, perhaps even after they go so far as to preview the picture, they will find that they need certain changes in their photographed film in order to get the result that they find essential. And if those changes are important enough they will call for retakes and make as many retakes as necessary to get the picture in the best shape possible.

Q. Then at the end of this account, compensation paid to stock talent, you have an item stock talent overhead (Defendants' Exhibit 18-D2)? A. That is correct.

143 Q. And was that stock talent overhead fixed upon the same basis as in the Camera Department, except for the percentage? A. No, sir, it was not.

Q. How was it figured? A. It was merely an arbitrary figure determined by the management that has been in practice for a number of years.

Q. So that this item of \$896.05 represents 25 per cent. of the stock talent in this picture, exclusive of Crawford and Montgomery? A. That is correct.

Special Master Auchincloss: That is for this stock talent overhead?

144 Mr. Hilborn: Twenty-five per cent. of the compensation paid to the stock talent, exclusive of Crawford and Montgomery, exclusive of stars who, in this picture, were Crawford and Montgomery.

Q. Do you know what the base of that 25 per cent. charge was, Mr. Craig? A. Well, I can't tell you what the basis was, because it has never absorbed the idle time of the stock company, but the management wanted to add no more than 25 per cent. They kept that uniform charge.

Q. Now, Mr. Craig, that amount appears on Schedule A-2 of the account (Defendants' Exhibit 18-E2) as a de-

Willard K. Craig—~~for~~ Defendants—Direct.

duction in computing the general studio overhead, does it not? A. That is correct. 145

Q. It is included in the aggregate amount of \$128,855.26?

A. That is right.

Q. Now, Mr. Craig, what was the method of charging department overhead in the Scenario Department, what percentage was used in that department? A. Twelve per cent.

Q. Twelve per cent. of what, Mr. Craig? A. Twelve per cent. of the writers' salaries working on that picture.

Q. And the Scenario Department overhead was over-absorbed to the extent of \$30,522.41 in the fiscal year 31-32?

A. That is correct.

Q. And that amount appears as a credit item on Schedule A-2 of the account (Defendants' Exhibit 18-E2), general studio overhead? A. That is correct. 146

Q. And to that extent reduces the amount of the general studio overhead? A. Yes, sir.

Q. Mr. Craig, what do the metal cabinets in this room consist of? What is contained in them? A. Well, we have endeavored to put into this room all of our records for the fiscal year of 1932 containing vouchers, that is, vouchers payable for accounts payable, they contain the transportation requisitions, journal entries—

Q. They contain all your bookkeeping records for the fiscal year 1931-32? A. Yes, sir, they do, our clock cards and our payroll cards, payrolls— 147

Q. Ledgers? A. Ledgers, and everything else.

Q. Where are they normally kept, Mr. Craig? A. Well, we have a filing room adjacent to our Accounting Department where they are kept.

Q. They were moved into this room especially for this hearing, were they not? A. Yes, sir.

Q. So they would be available? A. Yes, sir.

Q. For any questions that might be raised in connection with the accounting? A. That is correct.

Willard K. Craig—for Defendants—Direct.

Q. And they have been made available to the plaintiffs?

A. Yes, sir.

Q. They consist of approximately 30 feet of filing cabinets, and approximately 125 separate cabinets? A. About 50 feet of filing cabinets, to be exact.

Mr. Pollak: And about four or five cabinets in height.

Mr. Hilborn: That is right—besides miscellaneous books outside the cabinets.

A. Yes, sir.

Mr. Hilborn: I think this is as good a place as any to stop.

Special Master Auchincloss: Is it satisfactory to adjourn for an hour?

Mr. Driscoll: Yes, it is satisfactory to me.

(Whereupon, at 12:45 o'clock P. M., a recess was taken until 2:00 o'clock P. M.)

(At 2:00 o'clock P. M., Wednesday, March 3, 1937, the hearing was resumed, all parties being present.)

Mr. Hilborn: Mr. Craig, have you record here of the number of men who are working in the studio at this time, the number of people for the fiscal year 1931-32?

Mr. Pollak: I may interpolate that that question embraces women as well as men.

The Witness: I have no distinction between male and female employees. Mr. Hilborn, may I ask you to tell me how you want that? Do you want that for the average employees for the year, or do you want to take specific weeks?

Willard K. Craig—for Defendants—Direct.

Mr. Schwartz: The average for the year for each department. 151

The Witness: All right. I can give you the various departments here, the average number of employees.

Mr. Schwartz: When you speak of average, you mean—

The Witness: These will not be in departments. They will be by classification of labor. Several of these classifications of labor ~~may~~ come under the Construction Department, for instance, carpenters and painters, and others, but I will give it to you as I have it on my payroll.

Mr. Schwartz: When we are talking about average, we mean, of course, that there are more people employed during a big production schedule than there are a small production schedule. 152

The Witness: The total number of people on the weekly payroll divided by 52; 52 payrolls and divided by 52 for an average: Carpenters, 212; mechanical, 129; painters, 48; storeroom clerks, 11; staff shop, 15; grips, 19.

Mr. Schwartz: Grips are what, men that haul scenery?

The Witness: Grips are men that handle the scenery on the sets. Laborers, 131; maintenance and firemen, that includes janitors and so forth, 107; laboratory, 166; restaurant, 56; machine men, 5; precision machine men, 37; still department, 15; projectionists, 21; wardrobe, 62; Art Department, 25; cutters, 53; timekeepers, 7; script, 56; sound, 96; property and drapery, 57; executive, 38; business office, 6; plant and engineering, 10; casting office, 8; production office, 8; foreign department, 56; accounting department, 38; purchasing department, 3; publicity department, 26; reading department, 17; scenario department, supervision and 153

Willard K. Craig—for Defendants—Direct.

154

office, 12; writers on contract, 18; writers, non-contract, 41; Newcomb's Department, 4; directors, 17; assistant directors, 9; unit managers, 4; first and second cameramen, 23; assistant cameramen, 22; still cameramen, 7; company, technical, 3; miscellaneous production assistants, 3; music department, office and supervision, 12; musicians, various productions, 28; stock talent contract, 49, picture talent, 23.

Mr. Schwartz: What is the difference between stock talent and picture talent?

155

The Witness: Stock talent is the classification we give to people who are employed on long-term contracts. Picture talent are people who are employed for one picture only.

Mr. Schwartz: They don't include the featured players or stars?

The Witness: Featured players and stars would come under the stock talent group.

Mr. Schwartz: I see.

156

The Witness: I think I gave you last the picture talent. Call bureau, 23; picture talent, other producers, 2. That refers to artists we may borrow from outside studios. I will have to make another explanation here: The people that we call to the call bureau, which is a similar organization to the Central Casting Office, we pay a commission on, and I have given you the picture talent called through the call bureau and the picture talent no commission, averaging 9. Stock talent, not on contract, 14. We had the Eskimo company, that was a picture that was made up in Alaska. We had a special group on that of 6. Advertising and miscellaneous, 7, making a total average employees on the payroll of 1851.

Willard K. Craig—for Defendants—Cross.

Cross examination by Mr. Driscoll:

157

Q. Mr. Craig, at this time, during the fiscal year, what was the capacity of your studio in pictures? A. As to the number of pictures?

Q. The number of pictures that you could make. A. That is a very difficult question to answer. I don't know whether I am qualified to say what the capacity would be or not. I might say in comparison to other years that we made about the same number of pictures that we did in previous years.

Q. Yes. That is the best answer you can give to it? A. I wouldn't want to say that our capacity was eight pictures of one type, continuously shooting, because every picture has different requirements. Some pictures take longer to shoot than others, and vice versa. I don't know who would be qualified to state the shooting capacity of the studio. 158

Q. All right. What was the Cosmopolitan Pictures that you were talking about? A. Well, that is a corporation called the Cosmopolitan Productions, Inc., with whom we have a contract to produce pictures, and there was an agreement for the sharing of the profits when the pictures were finished—

Q. Pardon me. Go ahead. Had you finished? If you hadn't, Mr. Craig, go ahead. A. I was just going to say that Metro-Goldwyn-Mayer Corporation financed the pictures entirely and there were certain provisions in the contract where we were compelled to charge a stated amount of overhead. 159

Q. How many Cosmopolitan Pictures were made during that fiscal year? A. I am not prepared to answer that. I couldn't answer that right offhand, Mr. Driscoll, but I will be glad to give you that information.

Q. Will you get it for me later? A. Yes, I will.

Q. Can you approximate the number now? A. I would say five or six.

Willard K. Craig—for Defendants—Cross.

160 Q. Were those pictures full-length pictures, feature pictures? A. Yes, in all cases.

Q. And those pictures didn't enter into these items of overhead that you have explained here, did they? A. They didn't share in those departmental overhead accounts. We had an agreement that we were to charge a fixed general overhead charge.

Q. Against Cosmopolitan? A. Yes, sir, on a camera-day basis.

Q. Let's turn to the item of Compensation Paid to Stock Talent. We have Miss Crawford's salary? A. Yes, sir.

161 Q. We have a charge for Miss Crawford's salary on the amended accounting of \$18,916.68 (Defendants' Exhibit 18-D1)? A. That is correct.

Q. That, I think you said, included an item of something over \$2,000.00 for unused time of Miss Crawford? A. \$2,000.00 exactly, I believe.

Q. Well, I didn't figure it out exactly. I took your item. A. I made an error in the first testimony. I said it was \$2500.00, which was later corrected by a journal entry. It should be \$2,000.00.

Q. All right. Let's take \$2,000.00. That represents salary for Miss Crawford prior to the time when she began rendering services in the photographing of Letty Lynton?

162 A. Yes, sir. It is prior to the time that she started photography in Letty Lynton.

Q. It is time between pictures, is that correct? A. Yes, sir.

Q. And you also say there is an item of \$2500.00, similar unused time of Montgomery's that is charged in this item of \$10,000.02? A. Yes, sir.

Q. Where did the 2 cents come from, Mr. Craig? A. Well, on our stock people we charge them out on a daily basis. It frequently happens when they work on the odd day, we have to bring it down to even cents to make their weekly salaries. It works out in odd amounts.

Willard K. Craig—for Defendants—Cross.

Q. I understand you to say that in Nils Asther's case, there is no idle time? A. There is none in the salary shown here. The added charge on Nils Asther will show under your—

163

Q. Stock talent overhead? A. That is right.

Q. In other words, on the next page, page 2 of this amended accounting (Defendants' Exhibit 18-D2), there appears an item of stock talent overhead of \$896.05. That includes an item of approximately \$600.00 salary that was paid to Asther because of unused time? A. Yes, sir.

Q. And the other portion of that \$896.05 was some similar salary paid to other talent for unused time, is that correct? A. Yes, sir, on Lewis Stone and Karen Morley.

164

Q. So that the entire item of \$896.05 represents unused time? A. That is correct.

Q. Now, let's come to the next compensation paid for story. A. Yes, sir.

Q. According to your testimony, Meehan began work during the week ending December 9, 1931, and did his last work on this picture during the week ending February 10, 1932; is that correct? A. Yes, sir, that is correct.

Q. When was the writing of this picture finished, if you know, Mr. Craig? A. The last charges that I have for writing were in the week of February 10, 1932.

The Witness: I have here the weekly writers' report from February 4, 1932, to February 10, 1932, inclusive, and John Meehan is reported as having worked five days on Letty Lynton.

165

By Mr. Driscoll:

Q. Who makes up that report? A. It was made up by the head of the Scenario Department, approved by Mrs. Corbaley who was then one of the chiefs of the department.

Willard K. Craig—for Defendants—Cross.

166

By Mr. Driscoll:

Q. So that he was paid for 52 weeks in the year, wasn't he? A. Yes.

Q. And either his salary had to be assigned to some particular picture or charged to overhead, unassigned salaries, that is correct, isn't it, Mr. Craig? A. Yes, sir.

167

Mr. Hilborn: We can stipulate that all of these items in departmental overhead would not be charged directly to Letty Lynton, and that is why they are overhead. It goes through each item in overhead. It doesn't directly bear upon Letty Lynton. It is part of the operation of our business, all of which contributes to every picture. What we are willing to concede is that we cannot show, and do not claim that any item which is included in overhead directly could enter directly into the cost of Letty Lynton, or any other picture; that goes throughout all the overhead items.

168

Q. There are times when the Publicity Department is more active than at other times, are there not? A. Well, yes, but the Publicity Department's flow of activity is quite steady. They are busy all of the time because publicity involves the current stock company, seeing that no adverse publicity goes out on any of the stars, or any of the featured players, even when pictures are not in production they have to follow that, because any adverse publicity that gets out on those people means that you lose that much box office when they hit the picture. So that if we let something bad get out on Crawford, whether it was intentional or unintentional, that is going to hurt her box office value, and they are the watch-dog of the—

Q. Reputations? A.—of the publicity from the lot.

Q. The keepers of the reputations. Now, when you have directors who are not actually employed, of course, there

Willard K. Craig—for Defendants—Cross.

you know that they are not actually employed because if they are, they are assigned to a definite job; that is true, isn't it? A. Yes. 169

Q. And you carry them as unassigned salaries? A. That is correct.

Q. In your general overhead? A. Yes.

Q. The same is true of your writers? A. No. Pardon me. I will correct you on that statement that you carry them in general overhead. A director is treated the same as a star. If we put a director on salary today and we don't give him an assignment for three weeks, the salary that we pay him up to the date of that assignment is an accumulation against his picture that he is assigned to direct. 170

Q. So if you carried him for six months his salary would go into the next picture he made? A. That is correct. That is what we are paying for the direction of that picture.

Q. And the same is true of the stock talent? A. The stars only. That is, they are the only ones we treat in that way.

Q. Among those items is one item, for instance, of unassigned salaries to song writers and composers of \$81,725.82? A. That is correct.

Q. Now, those were not writers or composers that were engaged in making Letty Lynton? A. No, sir. 171

Q. They were other writers and composers that the company had hired and hadn't used and hadn't assigned their salaries to any particular production, and therefore put them in under the overhead of the Music Department; isn't that correct? A. There are other writers, or perhaps I shouldn't say there were other writers; the writers whose salaries were charged direct to Letty Lynton, that time is not charged in this unassigned salary group. What I am trying to get at is that some of the salaries—there are some of the writers who were on Letty Lynton who may

Willard K. Craig—for Defendants—Cross.

172 have had unassigned salary in this amount. (Indicating.)

Q. Yes. A. In this amount here. (Indicating.)

Q. But when they were working on Letty Lynton they were charged direct to Letty Lynton? A. That is correct.

Q. And when they were not working on any production, they were charged under this item of unassigned salaries?

A. That is true.

Q. At that particular— A. However, if we had had to go out and hire those writers for specific pictures we would have paid them a much higher rate of pay at the time they were working on the picture.

Q. Well, maybe, and maybe you wouldn't. It is a fact, isn't it, that they had a lot of unemployed writers and composers out here about that time?

173

By Mr. Driscoll:

Q. Now, Mr. Craig, in order that we may make this statement of Mr. Hilborn's perfectly clear, whenever a song writer or a composer was working on a particular picture, his salary was charged to that picture? A. That is correct.

Q. And if he was working on anything at all, he was assigned to some particular production, wasn't he? A. Not necessarily. We often assign a writer—a song writer who has no assignment. We will ask him to write a song in the hope that we can use it in some future production. In other words, a song writer is creating something. He just can't go out and, by so many hours labor, build some material thing. It is a creative proposition.

174

Q. But you didn't have any such songs in Letty Lynton, did you, Mr. Craig? A. I can't tell you just what songs were in.

(Whereupon, at 5:10 o'clock P. M., the hearing was continued until 10:00 o'clock A. M., Thursday, March 4, 1937.)

HEARING ON MARCH 4, 1937.

175

WILLARD K. CRAIG, having been previously duly sworn, resumed the stand and further testified as follows:

Cross examination (resumed):

Q. Have you a copy of the amended accounting there, Mr. Craig? A. Yes, sir, I have.

Q. Let's turn to the next page, page 5 (Defendants' Exhibit 18-D5)? A. Yes.

Q. Under the general heading of General Studio Overhead. A. Yes, sir.

Q. Do I understand that all those items on that page are New York items? A. The first item of \$2,246,000.00 is, not.

176

Q. Well, that is detailed in the next schedule we will take up, but the rest of those, if they are all New York items, I won't bother you with them at all. I don't think you have offered any proof as to those anyway.

Mr. Hilborn: They are all New York items.

By Mr. Driscoll:

Q. We will just pass that, Mr. Craig, and turn to the detail of this item of \$2,246,793.28, which appears on Schedules A-1 and -2 (Defendants' Exhibits 18-E1 and 18-E2). A. Yes, sir.

177

Q. Now, you have the first item on that sheet (Defendants' Exhibit 18-E1) as salaries, Executive Department, \$1,047,599.43. A. That is correct.

Q. What salaries go in to make up that figure? A. The salaries of management, producers and their assistants, and secretaries.

Q. It includes Mr. Mayer's salary? A. Yes, sir.

Q. That is \$130,000.00 charged in there? A. Do you want that broken down by individual salaries?

Willard K. Craig—for Defendants—Cross.

178 Q. I want it broken down to some extent, because I want to find out. A. Well, may I prepare for you a breakdown of that departmental salary group?

Q. Yes, I will be glad if you would make a note of that. If you will do that, we will pass that item for the present.

Mr. Hilborn: I think we can tell you what each individual got, Mr. Driscoll, at the present time.

The Witness: For the specific individuals we have their cards. Let me show you. May I take a payroll of the Executive Department for a week and read you the names?

179 By Mr. Driscoll:

Q. Yes. A. Would you like to have it about the period of Letty Lynton, and then at a subsequent date?

Q. Yes. A. I am going to take the week of March 16, 1932. I think that is during the period of production of Letty Lynton. I can give you other weeks if you prefer.

Q. That is a very good week. A. Do you want their salaries and their rate, would that be information you want, or just the names?

Q. I am anxious to know what salaries went into making up that item of \$1,047,599.43. A. Louis B. Mayer, 180 \$2500.00, General Manager.

Q. So that for the year in that item of \$1,047,000.00, \$130,000.00 of it was for Mr. Mayer's salary? A. Yes, sir. There was a rate cut in July, 1932, and Mr. Mayer took a cut, so that won't be an exact figure. We all took cuts in 1932, July 23rd. Have you got the cards on that? (Addressing Mr. Cochran.)

Mr. Cochran: We have Mr. Mannix' card. That might help you.

The Witness: Ida R. Koverman, secretary to Mr. Mayer, \$100.00. Grace Clark, stenographer in

Willard K. Craig—for Defendants—Cross.

Mayer's office, \$35.00. Janet Spooner, stenographer in Mayer's office, \$35.00. Irving Thalberg, \$1,000.00. Vivian Newcomb, secretary to Irving Thalberg, \$90.00. Frank Lawrence, assistant to Irving Thalberg, \$350.00. E. J. Mannix, executive, \$700.00. J. S. Partridge, secretary to Mannix, \$65.00. Louis Dorn, contact man, \$50.00. Do you want to know what that means? Dorn attends theatres and makes reports of theatre reactions for Mannix. Paul Bern, supervisor, which is the same as a producer, \$1500.00. Irene Harrison, secretary to Paul Bern, \$65.00. Felix Feist, assistant to Paul Bern, \$125.00. Harry Rapp, executive, \$3,000.00. Winifred—

181

Mr. Hilborn: Who is Harry Rapp?

182

Mr. Pollak: You might tell what he was an executive of.

The Witness: Harry Rapp was Vice-President of the organization, and also acts in a producing capacity. That is the reason we rated him as an executive rather than as a producer, solely. These are titles that I am reading from the payroll. They may not cover their entire function, but they give you a general idea of their function.

Winifred Able, secretary to Rapp, \$41.00. Frank Davis, assistant to Rapp, \$300.00. Ruth Carnell, secretary to Davis, \$41.00. Mary Hagenborth, reception clerk, \$35.00. Jack Cummings, assistant to Rapp, \$350.00. N. T. Peterson, secretary to Cummings, \$30.00. Lawrence Winegarten, assistant to Harry Rapp, \$850.00. Frances Woodward, secretary to Winegarten, \$41.00. E. B. Derr, supervisor, \$1250.00. Nan Fanger, secretary—

183

By Mr. Driscoll:

Q. How much was Derr? A. Derr, \$1250.00. Nan Fanger, secretary to Derr, \$35.00. B. H. Hyman, super-

Willard K. Craig—for Defendants—Cross.

184 visor, \$2,000. - Louis Bruckner, secretary to Hyman, \$60.00. James McKay, assistant to Hyman, \$175.00. Hunt Stromberg, producer, \$2500.00. Irene Glynn, secretary to Stromberg, \$55.00. Sam Zambalist, assistant to Stromberg, \$185.00. Tamara Palmer, assistant to Stromberg, \$50.00. Margaret Widenor, stenographer in Stromberg's office, \$35.00. V. P. Freeman, supervisor, \$1500.00. Hazel Stray, secretary to Fineman, \$50.00. Ben Piazza, marked here as "special," he was really acting in the capacity of a talent scout, \$300.00. John Emerson, supervisor, \$1,000.00. Albert Lewin, supervisor, \$1250.00. Myrtle Brady, \$50.00. Harold Wilson, assistant to Lewin, \$70.00. Payroll for that week was \$21,870.41.

185

Mr. Cochran: Will you read that again?

The Witness: \$21,870.41. There was one item in there of \$2.41 that was paid to one of the stenographers for overtime. Other than that, I believe they were all paid the straight weekly rates.

By Mr. Driscoll:

Q. Well, Mr. Craig, out of that \$1,047,000.00 item then, approximately \$130,000.00 represents Mr. Louis Mayer's salary for the year? A. That is correct.

186 Q. Subject to any adjustment on account of the cut taken about July, or thereabouts? A. That is right.

Q. And Mr. Thalberg, \$52,000.00 represented his salary for the year? A. Subject to the same general cut.

Q. Yes. A. Because that was a uniform cut I think almost without exception throughout the organization.

Q. Yes. Mr. Thalberg's \$52,000.00 was in addition to a New York office charge? A. So I understand.

Q. Now, Mr. Mayer, what is his title? A. Vice-President, and at that time carried the title of General Manager.

Q. Vice-President and General Manager? A. He is in charge of this studio.

Willard K. Craig—for Defendants—Cross.

Q. So that his general supervision, I suppose, filtered down through the various strata to the Letty Lynton picture, the making of the Letty Lynton picture? A. Yes, it did.

Q. And Mr. Thalberg, what was his title at that time?

A. Mr. Thalberg was an Executive Producer and a Vice-President of the corporation.

Q. And Mr. Thalberg had separate productions that he had charge of, did he not? A. He did, but he was also, you might call him the—he had the final say-so in all productions on the lot.

Q. I see. Now, do you know what part of his salary represented his position as Vice-President, and what part of his salary represented the work done by him in supervising the various productions on the lot; is there any distinction? A. I would not attempt to make any distinction myself.

Q. So that as supervisor of all productions on the lot, his influence also filtered down through the various strata to Letty Lynton? A. Yes.

Q. Now, Mr. Mannix' salary accounted for approximately \$36,000.00 of that \$1,047,000.00. That is correct, is it? A. That is correct.

Q. And what is Mr. Mannix' position? A. Mr. Mannix was business executive. Shortly after this time he was appointed General Manager by Mr. Mayer, and he functioned as Mr. Mayer's right-hand executive.

Q. Shortly after this started, but at the time of the making of "Letty Lynton", what was Mr. Mannix' position?

A. Well, he was, I might say, Assistant General Manager. He was merely titled as an executive, and he was the man in charge of the business end of the studio; when Mr. Mayer was out of town he was the man that was virtually—

Q. He was Mayer's pinch-hitter? A. I haven't attempted to define any of these titles, but his functions were that of General Manager under Mr. Mayer. That is the best way I can state it.

Willard K. Craig—for Defendants—Cross.

190

Q. That is, pinch-hitting for Mayer? A. Well, the job was too big for any one man to handle. He has to have assistants.

Q. And in that capacity as substitute for Mayer, or assistant for Mayer, or pinch-hitter for Mayer, or whatever it might be, his influence, I suppose, covered in a general way the production of "Letty Lynton"? A. That is true.

Q. And then we have Mr. Hunt Stromberg, who was the producer directly in charge of the production of Letty Lynton, isn't that correct? A. Yes, sir.

191

Q. And Mr. Stromberg, according to your figures, received \$2500.00 a week. That would be \$75,000.00 for the year?

Mr. Hilborn: How much? \$2500.00 a week is \$130,000.00.

The Witness: I said approximately.

Mr. Driscoll: In order to give Mr. Hilborn the benefit of the doubt, let's make that \$130,000.00 for the year. We will just forget the reduction for adjustments and so forth. Is that satisfactory, Mr. Hilborn?

Mr. Hilborn: I was just making the computation on \$2500.00 a week.

192

By Mr. Driscoll:

Q. So those four gentlemen, Mr. Mayer, Mr. Thalberg, Mr. Mannix and Mr. Stromberg accounted for approximately \$348,000.00 out of this \$1,047,000.00? A. I haven't kept track of the figures, and I can't verify your total, but the individual items were correct as stated.

Q. Well, I think they work out that way. Now, then, in addition to those four, we have in this list the various producers that you have mentioned here a few minutes ago, including, for instance, Mr. Rapf, Mr. Derr, Mr. Fineman,

Willard K. Craig—for Defendants—Cross.

John Emerson, Mr. Lewin. We have those gentlemen 193
 whose salaries are also included in that \$1,047,000.00? A.
 That is correct.

Q. Now, Mr. Rapf had nothing whatever to do with
 "Letty Lynton", did he? A. He was not directly in a
 supervisory capacity, but all of the supervisors act as
 counsel, general counsel, for each other's pictures.

Q. Yes. A. Well, that is a fact. They meet every day
 and discuss—discuss individual problems, but make col-
 lective suggestions.

Mr. Driscoll: Yes.

The Witness: In other words, a group of men of 194
 the calibre of these eight or ten men that you have
 mentioned here can bring a lot of ideas to a picture
 that one man can't do.

By Mr. Driscoll:

Q. Now, then, Mr. Craig, let's take Mr. Rapf. He had
 assigned to him a certain number of productions during
 that fiscal year, didn't he? A. Yes, sir.

Q. And he was the producer in charge of those produc-
 tions, he supervised them? A. That is correct.

Q. And under him he had directors? A. That is correct.

Q. And he had cameramen? A. That is right.

Q. And so forth. Now, Mr. Rapf did not have assigned 195
 to him the making of Letty Lynton, did he? A. He did.

Q. Mr. Rapf received \$3,000.00 a week, or \$150,000.00,
 or, on Mr. Hilborn's suggestion, we will make it \$156,000.00
 a year, is that right, approximately, with adjustments made
 in July? A. That is correct.

Q. Yes. And that \$156,000.00 is part of this \$1,047,000.00
 that appears on Schedule A (JS-E1) in the first item? A.
 That is right.

Q. And in addition to Mr. Rapf's \$150,000.00 salary for
 the year, he had a secretary at \$41.00 a week, he had an

Willard K. Craig—for Defendants—Cross.

196 assistant, Mr. Davis, at \$300.00 a week, or \$15,000.00 for the year, and Mr. Davis had a secretary at \$41.00 a week. Mr. Rapf had an assistant named Cummings at \$350.00 a week. He had an assistant named Winegarten at \$850.00 a week, and Mr. Winegarten had a secretary at \$41.00 a week. All of those were in Mr. Rapf's department, weren't they, so to speak? A. That is correct.

Q. Having to do with the productions of which Mr. Rapf had charge? A. That is correct.

Q. Now, in addition to that, we have Mr. Bern, who received \$1500.00 a week, or \$75,000.00 for the year, or we will make it \$78,000.00, if Mr. Hilborn wants us to, for the year. Mr. Bern had no direct charge of Letty Lynton, did he? A. No, sir. He wasn't directly assigned to Letty Lynton.

Q. Mr. Bern might confer with Mr. Stromberg, as you say, or with Mr. Rapf, or with Mr. Fineman, or any of the others, is that correct? A. That is right.

Q. Now, Mr. Bern, in addition to his salary of \$75,000.00, or \$78,000.00, a year, he had his secretary at \$65.00 a week, he had an assistant at \$125.00 a week, and all of those salaries are in this item of \$1,047,000.00 charged up on this Schedule A, is that correct? A. That is correct.

Q. Now, then, the same thing is true of Mr. Fineman, who had \$1500.00 a week, and a secretary, and an assistant, and so forth. All of those salaries are charged up in the same way as part of this \$1,047,000.00, is that right? A. That is correct.

Q. And the same thing is true of Mr. John Emerson and Mr. Lewin? A. That is right.

Q. So that when we sift the thing right down, out of the \$1,047,599.43, the only part directly chargeable to Letty Lynton are portions of the salary of Mr. Mayer, Mr. Thalberg, Mr. Mannix and Mr. Stromberg, and their departments, Mr. Mayer's secretary, and Mr. Mannix's secretary, and Mr. Stromberg's secretary, and so forth, isn't that correct? A. No, I wouldn't admit that.

Willard K. Craig—for Defendants—Cross.

Q. No, because you contend that they all get together and give each other ideas? A. I certainly do. 199

Q. Yes, all right. A. Any one of those men is more valuable because he has the association of the other men, rather than standing alone.

Q. Then we will come to the next item, expenses, Executive Department, \$16,482.79. What enters into that charge?

Mr. Hilborn: Mr. Craig, you have in front of you a statement showing each item, each particular item, which went into the total of \$16,482.79 in the fiscal year 1931-32?

The Witness: Yes, sir, I have.

200

By Mr. Driscoll:

Q. Before leaving this other item, Mr. Craig, there is one other question I would like to ask you. Mr. Stromberg, for instance, one of the four gentlemen that we mentioned together who was the supervisor of the production of Letty Lynton, he also produced a number of other pictures during that fiscal year, didn't he? A. Yes, he did.

Q. Letty Lynton was one of how many pictures that he produced during the fiscal year? A. I am not able to tell you offhand. It would be a matter of research for me to go back.

Q. Probably four or five, or six or more? A. Stromberg is one of the active producers. I imagine about four or five pictures.

201

Q. Yes. And Mr. Mayer's services of \$130,000.00, his services applied to all of the productions on the lot, 41 productions, and the shorts? A. Yes.

Q. And the same thing is true of Mr. Thalberg? A. That is true.

Q. And the same thing is true of Mr. Mannix? A. Yes, sir.

Willard K. Craig—for Defendants—Cross.

202 Q. Now, Mr. Thalberg, in addition to having general supervision over all productions on the lot, also had his own productions, did he? A. Yes, he did.

Q. That is, he was directly a producer the same as Stromberg and these other fellows in addition to having general supervision? A. Yes, he had his own pictures.

Q. As a matter of fact—

Mr. Cohen: Whose name did you mention?

The Witness: Thalberg.

By Mr. Driscoll:

203 Q. Let's come down then to this executive expenses of \$16,482.79. A. As I stated, I have in front of me the complete detail of those charging making up the item of \$16,482.79, representing the expense of the Executive Department, including such items as automobile transportation when an executive uses one of our transportation cars, it includes various additional stenographic help that we have from the Script Department, relief girls, office supplies, and innumerable small miscellaneous items.

Q. All right. You needn't go into detail on those unless you want to.

Mr. Pollak: Give us a few as an illustration.

204 The Witness: Do you want me to amplify that?

Mr. Driscoll: Mr. Pollak wants you to give a few as illustrations.

The Witness: Well, I see more transportation and script charges here that predominate, office supplies, store supplies, and various other small items.

Mr. Cohen: All right.

Q. Let's come down to Production Department, salaries, \$72,346.20. I would like very much to have you tell me what that means, what it is? A. Production Department

Willard K. Craig—for Defendants—Cross.

is a department that functions from the time the script is completed and ready for shooting through the production of the picture. They have under their supervision in a general way, or directly under their supervision, the assistant directors and unit managers. The first operation after a script is completed and ready to shoot is for the Production Department to break it down and schedule the shooting so that they can carry out their production schedule in the most efficient and economical way. 205

Q. Are your supervisors part of your Production Department? A. The supervisors, as we list them in the Executive Department?

Q. Yes. A. No, sir.

Q. They are not part of the Production Department? A. The Production Department handles only the physical production features of the picture. In other words, they have no jurisdiction to tell a director what he shall shoot. When he says he is going to shoot a certain scene in sequence, the Production Department must have the operating functions all correlated and brought together so that they can shoot at the given time. They prepare the estimates on pictures, and break down, lay out the detailed schedule of shooting, as I have already mentioned. 206

Q. Now, in this \$72,346.20, is there any item of unassigned salaries? A. The item that would be considered unassigned time there might be such vacations as the individuals of that department were entitled to. 207

Q. This production department also worked for the 21 shorts that were made during the fiscal year? A. They contributed to a very slight degree.

Q. The shorts pay no part of \$72,346.20, do they? A. They do, in that they were charged a certain amount of general overhead.

Q. When you say "general overhead", you take and lump everything together and make a charge against them for overhead? A. Right.

Willard K. Craig for Defendants—Cross.

208

Q. What was the charge for overhead made to the shorts?

A. I think the shorts was \$3500.00 per short, I think, in that year.

Q. All of those shorts were one-reelers, or were there some of them two-reelers? Or, put it this way: On the 21 shorts, how many reels were there? A. You are misquoting the situation, a trifle, because I believe my testimony yesterday was to the effect that we worked on 21 shorts, not that we completed 21 shorts during the year. I couldn't, without further investigation, say just how many were completed. I know that some of those shorts that were worked on were worked on in the previous fiscal year, and at that time they were charged on a basis of \$700.00 a day, but that charge went into the previous fiscal year.

209

Q. When you say \$700.00 a day, is that overhead, or does that include the whole cost? A. \$700.00 per production day. Usually a short will shoot in one to two days. We charged them \$700.00, or \$1400.00.

Q. A flat rate? A. Yes. I am remarking about some of the shorts that were worked on. I am referring to a schedule that I have in mind that I have prepared which shows that of those 21 shorts worked on, they were not all completed. Some of them had overhead charges that went back into the previous fiscal year, and in this fiscal year there were two charged \$3500.00 apiece for overhead.

210

By Mr. Driscoll:

Q. Two shorts? A. Yes.

Q. When you speak of this \$700.00 a day production charge made to shorts— A. Pardon me. I think you misunderstood me. The \$700.00 a day was the fiscal year prior to the one in which we are concerned.

Q. Oh, I see. A. There is no credit on the present fiscal year at \$700.00 a day on shorts, but you asked me, as I recall it, yesterday how many shorts we worked on during the fiscal year.

Willard K. Craig—for Defendants—Cross.

Q. That is right. A. I referred to my schedule which showed the increase in cost, and there were 21 that had had charges accruing against them during the fiscal year in question. Only two had been charged overhead at the rate of \$3500.00 a day, so that our general overhead received a credit of \$7,000.00 during this fiscal year for operation on shorts. 211

Q. For those two shorts? A. That is right.

Q. And there was no overhead charges against the other shorts? A. No, not in the fiscal year in question.

Q. Now, the salaries, maintenance, \$123,602.31, what does that include? A. Was that \$123,602.31? 212

Mr. Prager: That is right.

The Witness: That includes salaries of dressing room attendants, firemen, janitors, messengers, telephone operators, telegraph operators, and so forth, office boys, that is, boys in the reception office that show visitors around and run mail, and one thing and another, on the lot. If you want that broken down by the various classifications, I can give it to you.

Mr. Driscoll: No.

The Witness: It also includes our police department.

By Mr. Driscoll: 213

Q. Your nurses and doctors, are they charged direct to production? A. They are where we employ them and assign them to a production. I have in this account No. 817, nurses not assigned to production.

Q. That comes in under this item of \$123,000.00? A. Yes. It is \$2,745.00.

Q. And you assign nurses and doctors to the type of thing that we saw the other day out here at—

214 Mr. Cohen: Chatsworth.

The Witness: Yes, on locations. It is required in many cases, and it is practical in all cases, to have them there.

By Mr. Driscoll:

Q. Did you have any nurses and doctors used in Letty Lynton? A. I wouldn't be able to say offhand.

Q. If you did, they were paid for it? A. I would say this, if they were used on location and hired as such, they would be charged directly to the picture.

215 Q. Yes. A. However, we maintain on the lot a first-aid station and a nurse is always in attendance and she is available for call on any production that needs her services here on the lot.

Q. Part of this item of \$123,602.31 is salaries of nurses and doctors who are unassigned? A. That is correct.

Q. Listed here as salaries, maintenance. A. That is correct.

216 Q. Then we come down to the item of rental of studio and facilities, \$334,464.61. From whom is it rented, and to whom is the money paid? A. The title there is explanatory more than to be construed as actual rental. All of the assets of the corporation are carried on the home office books in New York. We do not figure any direct depreciation on the plant or equipment at the studio. This is a weekly figure that is set up and credited to the home office in lieu of depreciation. It is either absorbs or under-absorbs the depreciation that the New York office sets up, which I do not handle personally, and have no knowledge of the exact figure.

Q. All right, that fully explains it, I think. It is a figure set up in lieu of depreciation.

Mr. Hilborn: Mr. Driscoll, I think in the interest of clarity, so that we may have it together, there is

Willard K. Craig—for Defendants—Cross.

on this account on page 5 an item of unabsorbed studio depreciation of \$179,704.16. That item, plus the item which we are now talking about, \$334,000.00, the aggregate of those two items should equal the depreciation which is charged in New York at the end of the year for buildings and equipment.

217

Mr. Driscoll: All right.

Q. Now, then, we come to salaries of directors unassigned, \$27,715.49. Those are picture directors who are not working on any production, is that correct? A. Those are picture directors who, prior to the termination of their services, had unassigned time which could not be allocated to any definite production. As I explained to you yesterday, the normal procedure on a director is that when he goes on payroll, his time is accumulated, and if unassigned, is charged to his next succeeding production. We frequently have a man who finishes a picture and has idle time before his contract is terminated and, if not renewed, that idle time has to go into general overhead.

218

Q. Now, let me understand this, then: When a director takes up a production, all of his elapsed time from the finishing of the prior production is charged to the new production? A. That is correct.

Q. And would not constitute any part of this item here of \$27,715.49, is that right? A. That is right, yes.

219

Q. This \$27,715.49 is the end of the contract where the time is too short to assign a man to some job, or something that way? A. Yes, sir.

Mr. Hilborn: Where he is not assigned to a picture.

Mr. Schwartz: Where he is not reassigned and no new contract is made with him.

The Witness: I have one item here that illustrates what I mean. There was a director by the

220 name of Robinson whose contract was terminated by mutual consent, or otherwise, and there was a salary accumulation of \$4,345.00 which was charged into this account. Another termination was \$5,395.84.

By Mr. Driscoll:

Q. Let me ask you this question, Mr. Craig: Take, for instance, Clarence Brown. He was the director of Letty Lynton, was he not? A. Yes, sir.

Q. And Letty Lynton is here charged with his salary of \$75,000.00. Did that include idle time? A. No, sir. In the case of Clarence Brown, his contract called for a flat payment of \$75,000.00 per picture. If you wish—would you let me have Brown's contract?

Q. Well, if you say that is so, I won't require it. A. That is correct. It was a flat charge of \$75,000.00 for Brown's services.

Q. Regardless of the length of time that was required? A. That is correct.

Q. And therefore there was no payment on account of idle time? A. No consideration of idle time in that payment.

Q. The next item is rejected continuity charges and songs, \$63,996.57. Will you tell us what that is, Mr. Craig? A. Do you want the detail on that, Mr. Driscoll?

Q. Well, if you can tell me that it is songs and music, and so forth, that you have rejected, that was not used, it was paid for and not used, and that it had nothing to do with Letty Lynton, why, we will pass along to the next one. A. Well, that is a correct statement. It was not chargeable direct to Letty Lynton, and it has been rejected.

Q. None of it was bought for Letty Lynton? A. No, sir.

Q. All right. Now, then, accumulation—

Willard K. Craig—for Defendants—Cross.

Mr. Hilborn: In order that we may have the record complete, it is the exact amount which these rejected continuities and songs had cost the studio? 223

The Witness: That is correct.

By Mr. Driscoll:

Q. The next item is accumulation on rejected pictures, \$151,686.80. Letty Lynton didn't happen to be one of those pictures, did it, Mr. Craig? A. No, sir. I am sorry that it wasn't.

Q. This \$151,686.80 is money that was expended upon pictures that were never released, is that correct? A. That is correct. I have the list here some place, if you care to have it. 224

Q. I am not interested beyond that. A. Well, that is the case.

Q. Yes.

Mr. Hilborn: And charged off in this fiscal year?

The Witness: Yes, sir.

By Mr. Driscoll:

Q. And no part of it was spent on Letty Lynton? A. That is correct.

(At the hour of 2:00 o'clock p. m., Thursday, March 4, 1937, the hearing was resumed, all parties being present.) 225

WILLARD K. CRAIG,

By Mr. Driscoll:

Q. Mr. Craig, will you kindly turn to page 2 of the Schedule A of amended accounting? (Defendants' Exhibit 18-E2.) A. Yes, sir.

Willard K. Craig—for Defendants—Cross.

226

Q. The item of total overhead, \$2,246,793.28. There is reflected in that account \$298,025.47 from unassigned salaries of the domestic stock company; that is correct, isn't it? A. That is correct.

Q. And those unassigned salaries are in much the same category as unassigned salaries that we have talked about heretofore in this hearing? A. I don't believe you are quite correct in that, because the unassigned salaries of domestic stock company amounted to \$813,240.63.

227

Q. Yes. A. We have reduced that by the percentage that is already charged in the various pictures on the basis of 25 per cent added to the direct salaries of the picture, which item amounted to \$128,855.26. We have further reduced the unassigned salaries of the stock company by the profit that we made in renting our stock players to other studios which is purely a profit item over and above the cost of that artist for the loan-out. That credit amounted to \$95,170.98. So that in the balance of \$298,025.47 there has been a credit rendered the account for the profits that we have made on loan-outs.

Q. But that credit is against the item of \$813,240.63. That is no credit against any part of the \$298,025.47? A. No, that is true, but what I wanted to impress on you was the fact that the \$298,000.00 does not represent all of the unassigned salaries of the stock company.

228

Q. No. A. There is a far greater amount than that.

Q. Yes, but coming back to my question, let me put it this way: Whatever stock talent was used in the making of Letty Lynton was charged direct to Letty Lynton, was it not? A. That is correct.

Q. Yes. And this is entirely made up of unassigned salaries, unused artists? A. That is correct.

Q. The expense of carrying them? A. That is right.

Q. Now, these other debit items that appear on that page in that column with the \$298,025.47, except the last one, are the items that we have already talked about in

Willard K. Craig—for Defendant—Cross.

connection with the various other accounts that we have covered here in our examination, is that right? A. Yes, sir.

229

Special Master Auchincloss: I don't quite understand this compilation here. Was that less unassigned salaries, the \$304,429.80?

The Witness: May I explain it to you, please?

The gross unassigned salaries of our stock company, including our stars, amounted to \$813,240.63. In accordance with the practice that has been followed by the studio, the stars' salaries are accumulated and charged against succeeding pictures; whereas the featured players' salaries, other than stars, at the end of the year we clean our slate off and write off the unabsorbed balance to overhead, and we carry over the stars' salaries over into the next fiscal year, because we charge those salaries directly against the succeeding picture. So that at the end of the fiscal year 1932, we had \$291,188.92 representing stars' salaries that we were carrying over to charge in the succeeding pictures.

230

Special Master Auchincloss: I understand.

Q. Now, out of this overhead item of \$2,246,793.28 (18-E1, 18-E2), was there any part of that allocated to profit and loss?

231

Mr. Hilborn: I don't understand the question.

Mr. Driscoll: Well, it is a simple question. I think Mr. Craig will probably understand it.

The Witness: I think I had better answer that in this way: I do not know, because I do not handle the consolidated books of the home office.

Willard K. Craig—for Defendants—Cross.

232 By Mr. Driscoll:

Q. I see. A. I merely, in my closing fiscal year report for the year, transfer this amount as an unabsorbed item to the home office.

Q. For them to— A. Along with my negative costs of the year.

Q. Do you know that it is now the custom that studio costs not apportioned to specific films are charged in part to profit and loss, and the balance amortized as a separate film production, commencing with the next succeeding fiscal year?

233 Mr. Pollak: The question is whether he knows that it is or not?

The Witness: I will have to answer "No" to that question.

By Mr. Driscoll:

Q. You don't know that it is now done? A. No, sir. I have no information how the accounting is handled in New York.

Q. All right. There is just one other question at this time, Mr. Craig. You said there were 21 shorts, I think. Did you make any newsreels here? A. No, sir.

234 Q. So that the entire product was the 41 feature films, which included five Cosmopolitan, and 21 shorts for that fiscal year?

Mr. Hilborn: I think, Mr. Driscoll, that question assumes something that has not been testified to, 41 features.

The Witness: Our entire production costs for the fiscal year 1932 were made up of charges against feature productions in process during the year, and further included suspense charges against pro-

Willard K. Craig—for Defendants—Cross.

ductions that we anticipated that we would produce in the near future. In other words, before a picture has been definitely assigned to active production, we frequently have occasion to accrue charges against that other than story charges, and for that purpose we consider them suspense charges. In addition to that, we had worked on foreign versions and on the shorts, as has already been mentioned, and we had some costs accruing against productions that had been completed and transferred in prior fiscal years.

235

By Mr. Driscoll:

Q. I think that answers the question. I don't know whether I asked you the number of reels in these shorts.

236

A. There are one and two reels; I believe.

Q. Is there any method of telling me, have you any means of knowing, how many were two-reel pictures and how many were one-reel pictures? A. I would have to get that information from other records that I haven't available at the moment. If you would like to have us get that for you as a matter of information—

Q. I think it ought to be in the record.

Mr. Schwartz: Does that mean more than two that you say the overhead of which was charged in this fiscal year? I don't know that Mr. Driscoll wants a record of all of them.

237

The Witness: As I understood the question, you wanted me to tell you how many one-reel shorts we worked on, and how many two-reel shorts we worked on in the fiscal year.

By Mr. Driscoll:

Q. That is right. I think that is all just now.

Willard K. Craig—for Defendants—Re-direct.

Re-direct examination by Mr. Hilborn:

Q. Now, Mr. Craig, in order that we may make it perfectly clear what there is in this room, you have here a record of every dollar spent in studio production in the fiscal year 1931-32 for the general overhead and for Letty Lynton? A. That is correct.

Q. That means that you have a detailed statement of each item of expenditure? A. Yes, sir.

By Mr. Hilborn:

Q. Mr. Craig, in the operation of the studio, is it or is it not possible to keep the stars and directors working 52 weeks a year?

Mr. Driscoll: Of course, it is immaterial to our issue. We are not in partnership here, as the courts have said in a number of instances; objected to as immaterial and irrelevant to the issues being tried.

Mr. Hilborn: On specific pictures.

The Witness: Am I at liberty to talk?

Mr. Driscoll: I made an objection on the ground that it is irrelevant and incompetent. A number of decisions have held that we are not concerned with the general business in any way. We are not in partnership with them. We are entitled to the accounting of the profits of this picture, and we are not governed by their general business.

Special Master Auchincloss: What is your theory of the admissibility of it?

Mr. Hilborn: It is really to bring out clearly the reason for the pickup of the idle time on succeeding pictures.

Special Master Auchincloss: Well, I am in doubt as to whether it is good or not, but we will let it go in and see what he says.

Willard K. Craig—for Defendants—Re-cross.

The Witness: In the production of motion pictures we are faced with the proposition of preparing a story in continuity form, ready for production. It is a creative matter, not a matter of physical production, and hence cannot be turned out on a factory basis. The result is that there are often considerable delays between the time an artist or a director finishes a picture and the time that the succeeding picture is prepared and ready to shoot. There has never been a satisfactory way worked out, and it is impossible to work out a method where that can be controlled, because creative genius cannot be controlled in the sense that you can make a man think of something that is suitable within a given time.

241

242

Re-cross examination by Mr. Driscoll:

Q. You have heard of stars going direct from one picture to another, haven't you? A. I know it has happened in certain instances, yes.

Q. It is not impossible, is it, Mr. Craig? A. It is not impossible; but it is by far a very small percentage of the cases. I think in my experience in the studio in the last 12 years that there have not been more than five or six artists who have worked their 40-week period in any one year. I think, to be exact, there are two instances of that.

243

Q. And it is a fact also that under the method you use, if there is a stretch of three months between two pictures, you carry that star's salary over to the next picture? A. That is correct.

Q. And, Mr. Craig, this is true, is it not: You said, if I remember correctly, that props bought for a picture were charged to that picture? A. Yes, sir.

Q. You also said that props that were not bought for the picture, but taken out of stock, were not charged specifically to the picture; that is true? A. Yes, sir. There

Willard K. Craig—for Defendants—Re-cross.

14 is, no charge made for the use of props from our own stock.

Q. Yes, and props that are bought for a picture and charged to that picture are then put into stock without any credit? A. That is true.

Q. And that was done with the props that were bought and paid for by Letty Lynton; they went into stock to offset those that Letty Lynton might have used from stock, isn't that right? A. That is true. On Letty Lynton we purchased props for sets of \$873.01, and hand props of \$155.91, and that would not dress anywhere near the number of sets we have on the schedule, some 23 sets.

Q. But those went into stock at the end of the making of the picture? A. Yes, sir.

Mr. Driscoll: All right, that is all.

By Mr. Hilborn:

Q. Mr. Craig, Letty Lynton had the advantage of all the props that had been purchased prior to its production, and that applied to all the equipment, and the preparation of all the equipment, and the general studio efficiency which existed when Letty Lynton went into production?

The Witness: Yes.

Special Master Auchincloss: Are you finished with Mr. Craig for the time being?

Mr. Hilborn: Yes, sir.

(Witness excused.)

Special Master Auchincloss: Mr. Craig can be recalled at any time.

Mr. Pollak: I thought, to save time while he is coming, we might have a stipulation that the Master has, in part, examined the plant here at Culver City of the Defendant Metro-Goldwyn-Mayer. Do you want it detailed as to what the examination was?

Mr. Driscoll: Why, I don't believe that is any part of this record.

Charles Chic—for Defendants—Direct.

Mr. Pollak: Well, I believe it is. That is a question of law, but will you stipulate the fact— 247

Mr. Driscoll: Subject to my objection that it constitutes no part whatever of this record, I will admit the fact that the Master and all of us have had a very pleasant tour all over the entire plant, but I object to that constituting part of this record.

Mr. Pollak: I think the fact that the inspection was made is a proper part of the record and is usual. For instance, when there is a view of the premises, I think some note of the fact is made in the record.

Special Master Auchincloss: Well, it will go in over the objection for what it is worth. 248

CHARLES CHIC, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name, Mr. Chic? A. Charles Chic.

Q. And what is your present position? A. Production Manager of the studio.

Q. Will you speak a little louder? A. Production Manager for the studio. 249

Q. Thank you. And what was your position in 1932? A. I was the Assistant Production Manager.

Q. And, Mr. Chic, will you tell us in your own way what the function is of the Production Manager and of his department, especially of the department? A. All right. You want to know the personnel?

Q. Well, no. First tell us in a general way, in your own way, what the department is and does. A. We have, first of all, the Production Manager, the Assistant Production Manager, about eight to ten unit managers, and a

Charles Chic—for Defendants—Direct.

250 number of Assistant Directors equivalent to the number of companies or units, either, that we have shooting. That ranges anywhere from 12 on up to 18 or 20, depending on the number of units in which a company is split up. Then there are script clerks for all the shooting companies. That is the direct personnel.

Q. Let me interrupt you for a moment to make this clear to a fellow that is as ignorant as I am, and to the Master, who has no technical acquaintance, I guess, with the movie business. A Production Manager is not, himself, a producer; am I right about that? A. That is right.

251 Q. If I may put one or two questions that will help make it clear to me, for each production there is a producer who is the responsible head, subject to the General Manager and the Executive Vice-President? A. That is right.

Q. That is a producer who is the specific, responsible head of that production, is that right? A. That is right, yes, sir.

Q. And your department, the Production Manager's department, is distinct from the several organizations of the several producers, is that right? A. That is right.

Q. All right. Now, go ahead and tell us what your department does. You have told us pretty well who they were. A. Yes.

252 Q. Of course, you have an office force besides these officials? A. Yes. There is a large office force and a number of sub-departments directly connected with it. If you want to know about that later, I will give it to you.

Q. You might tell me now, in round numbers, about how large your force was in 1932, if you know. A. I should say about 40.

Q. I see. Now, go ahead. I won't interrupt you again, I hope. A. That's all right.

Q. Tell me what, in substance, the function of the department is. A. The function of the Production Department is to coordinate and collect and have ready all of the specific things that it takes to make a picture, in addition

Charles Chic—for Defendants—Direct.

253

to budgeting and controlling the spending of the money during the making of the picture. For instance, at the start of a picture a script is broken down and estimated by the Assistant Directors and script clerks and unit managers. This is done after we have had meetings with the heads of the various departments who will be concerned in the making of the picture. The Art Department will make sketches and models based on the requirements of the script, present them to the Director and Producer with the cost, and when it is agreed that that is how much money should be spent in that department, for instance, then we have a closed budget for that Art Department. The same thing takes place in every department of the studio that has to do with the making of a picture. We next have a budget meeting in which the heads of all these departments are present, and any question which may come up at that time relative to what procedure should be taken throughout the picture, on the method of handling anything, is decided, and among this group of people there is the Director, and frequently the Producer. When a budget has been completed and the amount of money that we plan to spend on the picture is approved by the Producer and the executive above him, we then go immediately to work among the other departments under our departments, such as the location department, for instance, getting locations lined up, the casting department lining up the principal people, organized by a chart which we make especially to show what time we will need various people. All the preliminary work is done sometimes as far ahead as a week to the actual starting of the picture, and with a very large picture we might be preparing for as long ahead as three months or more.

254

255

After the actual start of a picture, then the Production Department has to function from then on to see that everything runs smoothly and is ready on time. Frequently you have to readjust schedules which have been first made out in order to accommodate the other shooting companies.

Charles Chic—for Defendants—Direct.

256 Q. Let me ask you this, Mr. Chic, to see if I have it right: The Producer will come to your department, will he not, and say, as an illustration, "I have to have eight Eskimo sleds." Will it be your function to see that he gets them? A. Well, it doesn't work out exactly like that. It is our function to figure out how many sleds are needed. We suggest the amount from experience as to what we would need in a case like that. It is only in cases of large expenditures, or an expenditure over and above what has been approved in the original budget, where we have to appeal to a Producer. We control that in our office.

257 Q. Am I right in this—maybe I am not—is it true that it is the Producer's function to determine what it is he wants in the production? A. Usually it works like this: We will have a general meeting with the Producer and Director.

Q. Yes. A. And, as I said, with the head of the Art Department, and at that time the Producer will lay out the manner in which he sees the thing done generally. For instance, he will say whether the sets should be made very elaborate, or whether, for the type of picture it is, he thinks we should confine ourselves and spend our money more in one spot than in another. A general feeling about the picture is about all that he expresses, and from then on we organize it and present it to him.

258 Q. Is this correct: You are sort of a general staff that makes available the resources of the studio to whatever production is being done? A. Yes, that is very well put.

Q. And that applies even on the budgeting side to the extent that you have mentioned? A. Yes.

Q. Will you explain just what a unit manager is, Mr. Chic? A. A unit manager's position in this studio is similar to a stage manager's position, I imagine, in the theatrical profession, except that it is a little more complex here. I, as the head of the department, hold him directly responsible for any delays which may occur in the making

Charles Chic—for Defendants—Direct.

259

of the picture, or any unnecessary expense. For instance, here at the studio where we are so involved with a number of stars working in several pictures at the same time, he helps coordinate and arrange things so that we don't come into conflict.

Q: Do you have one unit manager for each picture? A. For our important pictures we have one unit manager. For the less important ones, one unit man can handle two or three.

260

Q. I see. Now, is this correct, that of central importance, from the standpoint of economy in production, it is necessary to have the various materials and also the various human agents that go into the picture ready as nearly as possible at the same time? A. Yes. That is the function of the unit manager and Assistant Director to so plan their work that there are no delays. We frequently, here in California, have to go to more expense in having alternate sets ready. For instance, during the rainy season we have prepared sometimes in three different ways with a call. We have to be prepared in case we are working on location and it is bad weather so that we have an alternative set to shoot inside. We also have to be prepared that we have an alternative set to shoot inside in case the wind is too strong on a location and we can't record sound. With almost any emergency we would still be able to work, and that involves quite a bit of careful preparation with people, so that they will be available for any exigency.

261

Q. You even have charge of transportation, have you not? A. We have charge of the railroad and airplane transportation, but not the transportation to and from the locations.

Q. Who conducts that? A. That is done by the head of the transportation department.

Q. I see. A. Although the unit managers are supposed to control the unnecessary use of rolling stock.

Q. There is one detail that struck me as rather interest-

Charles Chic—for Defendants—Direct.

262 ing. Am I right in understanding this, Mr. Chic, that if you have a number of scenes in which the stars appear, you may shoot those scenes continuously without regard to the sequence of the picture itself? A. Well, that is, of course, the most economical way to do it, but here I think that we are more inclined to spend the money, if we find that we get a better picture by permitting a Director to work in continuity, so that the quality of the story progresses along in a smooth way. If the Director is compelled to shoot a scene that takes place in the first part of the story, and then a few days after take the climax of the story, it is often puzzling and often not so good to jump that way when you have left out all the mood and feeling which builds up to that; and more now, I think, than ever we are trying, we spend a little more money and let them work in continuity where we can, although we lay it out the other way and present to a Producer the cost both ways. In cases where an actor is not available within those periods we are forced sometimes to make those jumps.

263

Q. You budget on both bases, is that right? A. Yes. We frequently make it out on both bases wherever it is seriously involved. If there are people who are not immediately demanded in another picture, then the question is not so serious, and we permit them to work in continuity. There are probably more things I could tell you, but I am just not sure as to what you want.

264

Q. Well, I think it is very interesting. I think you can tell us anything which you think about that would help to explain this to persons who are not acquainted with the business. A. I have always been a little proud of our studio for this one thing: A lot of studios, for instance, if we have a location which takes place in Africa, it is so much easier to put up a lot of palm trees and brush, and a cage and put an animal behind it, and call it Africa, but I think M-G-M has a very enviable reputation—possibly that may not show up so well in our final costs—but we usually

Charles Chic—^Qfor Defendants—Direct.

try to send out to a location where the locale of the story is supposed to be. For instance, we spent a long time in Alaska. We sent over to China for the stuff on the Good Earth. We sent to Morocco. We have been to the South Seas about ten times, and they are talking now about sending a company to India for Kim. That has been the policy of the studio, which I have been a little proud of:

265

Q. Mr. Chic, when you send such a unit away from Hollywood, your department has to provide its equipment, is that right? A. Yes. That, of course, is all budgeted just the same as a picture would be and, naturally, has to be done far in advance of the making of the picture. There are times when we send the actual people who are going to play in the whole picture, as we did in Alaska, and the pictures that we sent to Africa on, but occasionally it will be that we will just shoot portions of it with maybe not as important a Director, or where it isn't necessary to send the entire crew. The cost of it is all approved, of course, before we do it.

266

Q. Just as a matter of mechanical explanation for the record, you have told us what a unit manager is. Will you tell us what an Assistant Director is? A. An Assistant Director's duty is to be as close to the Director as possible all the time during the shooting, and previous to shooting, to have lined up for him all of the people that are required for the scene, to see that they are in their correct wardrobe, properly made up and on the set ready in time to work. It is also his function to direct background action and to remind or suggest to the Director anything which, in his opinion, the Director may have overlooked, like an extra touch for cutting, or that sort of thing.

267

Q. And the script clerk, what is he? A. The script clerk's duty is to keep a written record on the set during the shooting of the action as it was shot, showing any changes that were made in the script and act as a prompter in dialogue, and to keep the various reports that we require

Charles Chic—for Defendants—Direct.

268 as to the time consumed in shooting any particular scene, or anything that might be needed for reference so that we can go back and retake that same scene, if we have to.

Q. Mr. Chic, I was watching a shooting the other day. Is the script clerk the young man with an enormous tome spread out before him who seems to be jotting down notes all the time? A. Yes.

Q. And I suppose he makes a record so that if the leading actress seems to get a particularly effective entrance by coming in three and a half feet to the left of the peach tree, he just notes that in case they want to shoot a scene over again? A. Yes. I think a script clerk is probably
269 more important here than in most studios, because I think here we make more retakes than in other studios. It costs us more than a lot of studios who, without mentioning names, are quite willing to let their pictures go out without perfecting them as we do here. We take sometimes as much as a week or more on retakes on a picture just to try and perfect it and make it as good as it can be made. That requires a lot of detail to be kept track of, so that when we go back and pick up these little scenes they can tie in with what has been done previously.

Q. Some of these retakes are made after some preview, are they not? A. Yes, they are, although we do make
270 retakes sometimes previous to a preview if, in the opinion of the Producer, it is not as good as we can get it.

Q. I think, Mr. Chic, you have given us a very good account, unless you have something else you would like to add— A. I can't think of anything more. Probably we could talk for a long time, but I don't know exactly what kind of information you want.

Q. Mr. Driscoll, my friend over on the other side, may have some questions to put to you.

The Witness: Have you?

Charles Chic—for Defendants—Cross.

Cross examination by Mr. Driscoll:

271

Q. Mr. Chic, when did shooting start on Letty Lynton?

A. Well, I didn't come prepared to tell you that. I know that we made the picture in 1932.

Mr. Driscoll: Well, are you willing to concede, Mr. Pollak, that Mr. Stromberg has testified in this case that shooting started on February 24, 1932, and finished on March 28, 1932?

Mr. Pollak: There is no dispute about it.

Mr. Driscoll: And the story, Letty Lynton, was purchased on December 4, 1931. That is the date of the contract, Exhibit D in the trial. The picture was released on April 28, 1932.

272

I have no further questions, Mr. Chic.

Re-direct examination by Mr. Pollak:

Q. Am I right in thinking that the substance of what you gave as the description of the functions of the Production Manager's department applied in 1932? A. Yes, you are. Knowing what period you were talking about, I didn't tell you all the various departments which since have been incorporated under my department. I now have control of four departments that I mentioned to you.

273

Mr. Pollak: I think you gave both a modest and an accurate account.

(Witness excused.)

FRED GABOURIE, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Fred Gabourie.

Q. What is your function? A. I am the Superintendent of Construction.

Q. Of the Construction Department of Metro-Goldwyn-Mayer? A. Yes, sir.

Q. Did you hold the same post in 1932? A. Yes, sir.

Special Master Auchincloss: What department is that?

Mr. Pollak: Superintendent of Construction, Mr. Master.

Q. And, Mr. Gabourie, we will go into the details later, but as a preliminary to the explanation, yours is a very large department just in sheer number to begin with, is it not? A. Yes, sir.

Q. The numbers, I suppose, change from time to time, depending upon the amount of construction there is? A. On the amount of production, yes, sir.

Q. What is the largest number of men that you may have in the Construction Department at a given time? A. Well, I have had as high as 4,000.

Q. In the Construction Department? A. Well, in all the departments I have that come under me. That is, we have separate departments.

Q. I will come to that in just a moment. Roughly, what number would be an average number, say, in 1932? A. Oh, I would say between 1800 and 2200, maybe 1600 or 2200. We have peaks.

Q. Depending on the amount of production that you have? A. Yes, sir.

Q. Now, will you describe, in general terms, the divisions of your department, Mr. Gabourie? A. Well, we have what we call the carpenter department.

Ered Gabourie—for Defendants—Direct.

Q. You might tell us as to each department in a general way what it does, or if you would prefer to indicate it in some other way, it is entirely up to you. Well, let's see, the carpenter would come first. He builds the sets. The painter paints them. The grips department puts them in and takes them down. The labor department cleans up after them and hauls stuff around the lot. There are truck drivers, tractor drivers. We have what they call a prop shop, men who make special effects. We have a nursery, nursery men who put up trees, build trees, handle foliage. Then there is the plumbing department, plaster shop, modelers and casters, and they all tie in together in building a set. On some sets we don't have any plaster. In other sets we have a terrific lot of plaster. The departments are all kept together for the reason that we have to have them when we do have plastering or painting. So the carpenters and painters have to work all the time, naturally.

277

278

Q. And how many shifts do your men work? A. Four shifts.

Q. Four shifts? A. Six-hour shifts.

Q. In other words, the Construction Department is at work all day? A. Twenty-four hours.

Q. And every day? A. Every day but Sunday, but that comes in spells occasionally. We stop at 12:00 o'clock Saturday night, and start at 12:00 o'clock Sunday night.

Q. But for six days in the week you function 52 weeks in the year? A. Yes, sir.

279

Q. Now, I take it these various subdivisions have their own sub-department heads, have they not? A. Well, they call them Assistant Superintendents, that is, they all work directly under me through my office, but we have a separate man for each one of those divisions.

Q. Are there Foremen under each of these Assistant Superintendents? A. Yes, sir.

Q. In charge of specific jobs? A. Yes, sir.

Q. And is this right, in addition to the departments you

Fred Gabourie—for Defendants—Direct.

80 have mentioned, just to get the thing complete, there is a miniature department? A. Well, it is called prop shop and miniatures. We have a Foreman for the miniatures and a Foreman for the prop shop.

Q. What do the miniatures mean? A. Miniatures are buildings that are built under size, probably quarter scale, on a miniature stage. They photograph it first and then tie it into a set afterwards. Buildings are cut, are built 1/6th the size of a regular building, or whatever scale is necessary.

Q. You mean your miniatures are as large as that? A. Oh, yes, quarter size.

81 Q. Then you build them ultimately— A. We can build them any size that is necessary for the particular shot.

Q. But when you finally take your shot, if you want to represent an eight-foot wall, what you have is an eight-foot wall, isn't that so? A. Well, we can have them quarter size. It doesn't have to be a half, an eighth or two-thirds.

Q. I understand, but don't you commonly finally shoot from actual sizes? A. On the majority, 90 per cent of our stock is done full size.

Q. Well, maybe I misunderstood you. It is customary somewhere in the course of construction, is it not, to build a miniature of what you are going to have?

82 Mr. Driscoll: Aren't those called models?

The Witness: Models. We build a model of every thing we have.

By Mr. Pollak:

Q. Oh, I'm sorry. A model is different? A. A model is much different.

Q. Explain what the miniature department does. A. Well, the miniature department will reproduce a mountain, we will say for argument's sake, in Africa, small size, one-

Fred Gabourie—for Defendants—Direct.

eighth, one-sixteenth, whatever size we wish to shoot at it. 283
We build it up in detail and then photograph it.

Q. I see. A. It can be anything. We make a railroad wreck out of a miniature.

Q. You adjust the sizes by photographic devices, or what-not? A. As far as we wish to get away from it. If we want to stay away a mile, we can make the miniature that much smaller.

Q. I see. Tell us about your gardening department. A. Well, on our gardening department that is kind of hard to tell. We spent last year \$52,000.00 for material alone in it, that is, for trees, brush, flowers, cut flowers, plants, everything you can possibly think of that grows, we use. 284

Q. With nursery men, of course, in charge? A. Yes.

Q. And is this true, as a general statement, that in each one of these departments you have highly skilled mechanics trained in their particular occupation of plastering, say, or carpentering? A. Yes.

Q. And some scientific technicians, and many of them? A. We have many of them.

Q. Many of them. What about glass? Have you charge of that glass blowing? A. Yes.

Q. Then the arsenal department. That sounds a little striking to me. Will you tell us something about that?

A. Well, we have three men that work in that, who are really good powder men, professional men. They keep up the machine guns, and rifles and revolvers and all types of guns. That is kept under lock and key. We have to have a state license to have them, so we have to have licensed men to handle them. It requires two to three men all the time. Then, of course, we don't know how many men we use every day. We just finished with a set using 31 men working on powder and guns the day before yesterday. 285

Mr. Schwartz: That was out at Chatsworth?

The Witness: Out on location.

MICRO CARD

TRADE

MARK



22

39

2

1409



65



Fred Gabourie—for Defendants—Direct.

By Mr. Pollak:

Q. Well, whatever is physically required to be erected indoors or outdoors for any set on the studio or on location, then, I take it, is the function of your young army of men to create? A. That is right, yes, sir.

Q. Your department, I think, has the distinction of having an accounting force of its own, isn't that so? A. Well, yes, sir. We have to keep track of the figures. We get cooperation through the accounting office up front, and we carry our own figures.

Q. That is, you have time cards, I suppose? A. Yes, sir.

Q. And make out payrolls? A. No, we don't make out any payrolls, only the time cards, that is all.

Q. I see. By the way, do you supply the truckage for the studio? A. Just for the immediate studio, nothing for outside. I have charge of the trucks that haul everything around the lot, but my trucks do not go outside.

Q. I see. Now, to get the physical equipment straight, you have, of course, a carpenter shop? A. Yes.

Q. And a prop shop? A. They are both combined, but called separate departments.

Q. That is, you actually make the props, if they are to be made? A. Yes, sir.

Q. You have a building for the paint department? A. Yes, sir.

Q. And for the plaster shop? A. Yes, sir.

Q. And for the plumbing department? A. Yes, sir.

Q. That is a separate building for these three that I have mentioned? A. Yes, sir.

Q. And a separate building for gardening and landscaping? A. Yes, sir.

Q. Do you employ landscape architects? A. No.

Q. You do your own landscaping? A. We do our own landscaping.

Q. With the assistance, I suppose, of the Art Depart-

Fred Gabourie—for Defendants—Direct.

ment? A. The Art Department draws the plan. They give us some idea of what they want, and our men carry it through.

289

Q. Just as a matter of explanation, the Art Department here includes architecture and landscape architecture? A. That is correct.

Q. How many buildings do you use for storage? A. Well, we have three complete buildings for scenery storage plus, I would say, 10 acres on another lot, some 1,000 feet of storage on this lot that we have, it is uncovered.

Q. You have tractors and trucks? A. Yes.

Q. And boom trucks? A. Boom trucks.

Q. Which are what? A. Well, they are a truck that carries a 22-foot stick on it that has power and has a winch on it. We can pick things up, up to five tons. It is just like a regular boom, but it is stationary.

290

Q. Well, but this stick, you mean what we colloquially call a crane or something? A. That is right.

Q. You have a mill, I believe? A. Yes, sir.

Q. What sort of a mill? A. Well, we re-saw lots of our own material. We use stickers, planers, rip-saws, and so on. That is in one mill. Then, of course, in our shop we have hand-saws, jig-saws, a complete set of machinery.

Q. It sounds pretty complete to me. You have a lumber yard? A. Yes, sir.

Q. And in what sort of units do you buy your lumber?

291

A. Well, I can't really tell you how much they buy at a time. I understand last year they had something like, I don't know, 15,000,000 or 20,000,000 feet of lumber in here.

Q. Besides putting up the sets, do you take them down? A. Yes, sir.

Q. That is, you strike the sets, as the phrase goes? A. Yes.

Q. And do you store such of the "stricken scenery," such of the sets as you keep? A. Yes, sir.

Q. And the props are under your control? A. No. Props are under Mr. Willis. That is what we call set dressing.

Nathalie Bucknall—for Defendants—Direct.

292 Q. I mean even the physical storage of them is not with you? A. No, it is another department.

Q. Well, I suppose when some entirely new kind of set is needed, you have to go ahead and construct it from plans given by the Art Department? A. From plans given by the Art Department, yes, sir.

Q. Is this a substantially correct statement—if it isn't, you make it correct—that in the work of construction in some process or other, you use practically every known craft? A. Yes, I believe we do.

Q. Now, are the things that you have told us about, were they, in substance, true in 1932, as well as true today?

293 A. Yes, sir.

Q. The general process was the same? A. Yes, sir.

Q. And the general organization was the same? A. Yes, sir.

Q. And your function in production was the same then as it is now? A. Yes, sir.

Mr. Pollak: Any cross examination, Mr. Driscoll?

Mr. Driscoll: No.

(Witness excused.)

294 HEARING ON MARCH 3, 1937.

NATHALIE BUCKNALL, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Mrs. Bucknall, what is your position with Metro-Goldwyn-Mayer? A. I am the head of the Research Department.

Q. And did you hold the same position in 1932? A. Yes.

Nathalie Bucknall—for Defendants—Direct.

Q. In order to get some of these things on the record I am going to ask you a little about your personal biography, Mrs. Bucknall; you are a Russian by birth, is that right? A. Yes.

295

Q. And I believe you fought in the Battalion of Death in the Russian Civil War? A. Yes.

Q. And, with many other Russians of your class, you emigrated after the Bolsheviks came into power, is that right? A. Yes, I followed my husband to America.

Q. And you speak how many languages? Don't be too modest about the thing. A. I speak fluently four, Russian, English, German and French, and naturally out of the four I understand and read approximately 12.

296

Q. And it is sufficient for our purposes that included in those 12, besides the four you have mentioned, are Spanish and Italian? A. Yes.

Q. With the command of the Slavik languages and English, French and German, and the two principal romance languages other than French, you can make yourself acquainted, I suppose, with pretty much all the literature on a given subject that is published in the wide world, isn't that true? A. Definitely so.

Q. Now, would you tell us, in a general way, explaining it to persons like me who don't know anything about the movie business and are attracted by it, what the function of the Research Department in the Metro-Goldwyn-Mayer organization is? A. To supply information on every picture made by M-G-M to every department on the lot, who require first-hand information.

297

Q. And it is your function, literally, to be a local encyclopedia for a given production, is that not correct? A. Yes.

Q. And by you, I mean the function of yourself and your department? A. Yes, my department included, naturally.

Q. How many assistants, approximately, did you have in 1932, Mrs. Bucknall? A. Seven, I think.

Nathalie Bucknall—for Defendants—Direct.

298. Q. Now, what resources and facilities have you for the procuring and supplying of information? A. I have a large library, magazines which I get from all over the world which are clipped and placed in the files, various documents collected from all over the world and, naturally, the resources of the various libraries in the town, all over the United States, and of course from it we can get material from abroad on given notice.

Q. How many books have you in your own library, roughly? A. Roughly, 7,000.

Q. That is exclusive of clippings and magazines? A. Entirely.

299. Q. Entirely. Now, I suppose a particularly important feature of your work is the insuring of the accuracy of details of place and circumstance and costume, isn't that correct? A. Exactly so.

Q. And Mr. Schwartz reminds me that customs may be even more difficult than costumes? A. Yes.

Q. I am using all these terms very inclusively. Architecture, of course, would be a feature calling for constant checking, is that correct? A. Yes, definitely.

Q. The precision of scientific demonstrations of every kind would require checking, would it not? A. Yes.

Q. For example, the operation of a train or a boat, is that correct? A. Yes, definitely.

300. Q. Now, I suppose you would have to find out what the ordinary mode of life of a given class of a particular community would be, roughly, when they dine, for instance? A. Very much so.

Q. How they dine? A. Yes.

Q. What kind of food and drink would be served at a dinner? A. Yes.

Q. And to take one illustration among thousands, I suppose you would want to know how a person of a given rank is addressed? A. Yes.

Q. Whether you call him Mr. Secretary, or Secretary, or plain Mister, or what not, is that right? A. Yes.

Nathalie Bucknall—for Defendants—Direct.

Q. And you would want to know essentially the same things which may be much harder to find out if the locale was, say, Guatemala, or Czechoslovakia? A. Yes.

301

Q. This whole system was in operation in 1932? A. Yes, and previous to that, since 1927, when I came to the studio.

Q. You created the department, is that not right, Mrs. Bucknall? A. I enlarged the department which was definitely in the embryonic state.

Q. I see. Is this a correct statement, that essentially the Research Department is a distinctive feature of this particular studio, Mrs. Bucknall? Perhaps I will withdraw the question. Have the other studios similar Research Departments? A. Yes, but not operating on the same line.

302

Q. Not operating on the same line? A. No.

Q. Mrs. Bucknall, you have a system of recording, have you not, what inquiries were addressed to your department, and what researches your department made, in connection with each picture? A. Yes, sir.

Q. And that system has been in effect, if I am right, since 1929? A. Yes.

Q. Now, have you actually available the records showing the researches among which your department was engaged in connection with the picture Letty Lynton? A. Yes.

Q. Would you take the list of those researches and read them off to the Master? A. Mr. Tolubof, for Letty Lynton, books on Portugal, suggest Portuguese names, suggest Portuguese surnames, books on Corsica, suggest name for Turkish gentleman. I have to explain here that at first it wasn't decided which locale was to be used for Letty Lynton. I will take something else at random.

303

Mr. Driscoll: What was the date of that last one, Mrs. Bucknall?

The Witness: January 21, 1932. January 26th, same year, Mr. Tolubof—

Nathalie Bucknall—for Defendants—Direct.

By Mr. Pollak:

Q. Miss Tuchok was one of the writers? A. Miss Tuchok was one of the writers. Check all South American files for pictures of Montevideo and Buenos Aires. Check National Geographic for same, Stoddard's Lectures for same. Check Burton Holmes Lectures for same. January 26th, a general list of requests for production Letty Lynton. Montevideo street scenes, taxicab, Montevideo license plate for same, chauffeur's uniform for same, exterior-interior tango barn, cigarette girls, waiters, types for same, soldiers Montevideo, horse cab Montevideo.

Q. May I interrupt for just a moment. When it says, for example, chauffeur Montevideo, does it mean what kind of a costume a taxicab chauffeur would wear? A. Exactly.

Q. And a license plate is what that would look like? A. For a taxicab, or for any car.

Q. Excuse me. Go ahead. A. Interior, hotel lobby Montevideo, bedroom scene, elevator in lobby, policeman, Montevideo, which steamships call from Cape Town to Uruguay. Is it a through line to New York? What lines ply between Uruguay or Buenos Aires and New York; better class liners, modern German liners, interiors of same, deck scenes of same, staterooms, same, dining rooms, uniforms of crew, officers, sample of ship's newspaper, radio-gram received on board, stewards, all uniforms, determine which line to use. Those are all requests on January 26th. February 3rd, Mr. Harnell, one of the draftsmen, pictures of Mexican decoration, books on Mexican design, file, Mexican architecture, file, arts design. By "file" it means all material available in architecture in our files. February 9th, Mr. Gibbons—

Q. Mr. Gibbons is the head of the Art Department? A. Yes, sir, and Mr. Tolubof is the Art Director of production; pictures of houses at Lake Saranac, New York, for types of architecture. Pictures of Adirondack Mountain lodges. Mr. Gibbons, the same date, and Mr. Tolubof, ad-

Nathalie Bucknall—for Defendants—Direct.

ditional for all pictures of Yosemite Lodge, and all pictures of Mt. Baker Lodge. Production Letty Lynton, request on February 9th, liquor slip as used on board ship to be signed. Radiogram as used on board ship. Christmas Eve celebration on ship. New York skyline. Pictures South American line docks. New York also. U. S. Customs, New York. U. S. Customs Officer's uniform. Check whether for 736 Park Avenue, telephone exchange of Murray Hill would be okay. New York subway interiors. Turnstile from hotel in subway. How long from Montevideo to New York by boat? How long from Montevideo to Havana, and then the detailed replies to same. Interior of District Attorney's office, New York. Picture, Lake Saranac, New York. Pictures mountain lodges generally. Pictures of Mt. Baker-Yosemite Lodges. In this case, the request of Mr. Gibbons and Mr. Tolubof above previously recorded has been entered for the same material that had to be sent, and additional material had to be sent to the Property Department and the draftsmen who wanted the same information and data as sent to Mr. Gibbons and Mr. Tolubof.

Mr. Vasian on February 12th—Mr. Vasian was a draftsman in those days—pictures, U. S. Customs on docks in New York. New York docks showing passport and income tax inspection desks. Mr. Thompson—I think he was a draftsman—all the files on Mexican pottery, Mexican architecture and art pottery books on Mexico. February 13th, Mr. Brown, the Director, and Mr. Tolubof, Art Director, two hour conference on story. That means I had to be present and give information on any question that they might ask in connection with this particular picture. Mr. Brown, "How to pronounce Montevideo." February 13th, same day, Mr. Brown, pictures Uruguay and Argentina. Types, pictures of soldiers and officers, same two countries. What type architecture would tango barn be? Would windows have grilles? Do they have Eucalyptus

Nathalie Bucknall—for Defendants—Direct.

0 trees there? Would they have a Bel Air or Santa Barbara stretch of beach at Montevideo? Are hotels on waterfront of Montevideo? Do ships dock in town of Montevideo? What type tenders? How do boats dock at Buenos Aires? Are there any horse-drawn carriages in Montevideo? What are suburbs of Montevideo? Types of South American Indians wearing ponchos; also gauchos. What types dinner clothes would gentlemen wear there? Do women use fans a lot? What type of hair do they wear? What type of fans in hotel bedrooms? What type fans in hallways and lobbies? What type furniture? What type floors? Do they use carpets? When do Winter fogs start? How long was steamer from Buenos Aires to Montevideo? Do they use heavy draperies in houses? What is value of Uruguayan peso? Mr. Havens, same date, February 13th—

1 By Mr. Pollak:

Q. Who is Mr. Havens? A. He was a draftsman, I think, in those days. Deck scenes on Steamship Bremen. File, transportation, steamships, Atlantic. Enclosed views of doors leading to stateroom and lounges from decks, Steamship Bremen. In this case a ship was used which does not go to South America to give suggestions of the type of architecture they may want to use for deck scenes, cabins, and so forth. February 15th, Mr. McAfee, he is an Art Director. In those days he was a draftsman. Pictures, interiors Ritz Hotel, New York. The prop man on the same production wanted a Braille book for the blind. They had an idea that they might want to use that in a picture. Mr. McAfee, again, same day, pictures of interiors Ritz Carlton Hotel in Boston. File of U. S. architectural hotels and file New York architecture, hotels. February 19th, Mr. Fred Hersh, International Newsreel photograph of boat races, Poughkeepsie. February 20th, Mr. Dorian. He was Assistant Director for picture. Uni-

Nathalie Bucknall—for Defendants—Direct.

form of captain of Bremen, or similar ship. Uniform of first, second and third officer, chief engineer, purser, radio operator, chief steward, dining room steward, room steward, deck steward, bartender, waiters in bar, waiters in dining room, first mate, second mate, tango barn, Montevideo types tango barn, bus boys.

By Mr. Pollak:

Q. Now, Mrs. Bucknall, that is almost all, and we are very much obliged. I want to ask this: It has been suggested in this case that the amount of research, while of course it varies from picture to picture, would necessarily be greater in connection with a period picture than with a picture largely laid, for instance, in South America but modern. Is that true, that the period pictures necessarily call for more research? A. Definitely.

Q. They call for more research than, say, a modern picture in a foreign location? A. Not always. Sometimes a modern picture laid in a foreign locale requires quite as much work as a historical production, because so very little is written on the customs, modern customs, of foreign peoples and their costumes in foreign locales, whilst on the historical pictures and period pictures we always can find confirmation and information which is printed.

Q. And, Mrs. Bucknall, is it the fact that Letty Lynton required at least the average amount of research? A. I would say more than the average for a modern picture.

Q. And, roughly, I suppose, as nearly as one can determine, is it fair to say that it required at least the average research, taking all types of pictures, feature pictures that you produce? A. Would you mind repeating the question?

Q. Yes. I didn't put it very well. In fact, I will try to make it simpler. Comparing Letty Lynton with your other feature pictures— A. (Interrupting.) Yes.

Q. (Continuing.)—whether modern or period, would

Nathalie Bucknall—for Defendants—Direct.

316. Letty Lynton average out with the lot in respect to the amount of research required? Would it be as much as the average, or a little more, or a little less? A. It would be more than the average.

Q. More than the average? A. Yes.

Q. Mrs. Bucknall, you are familiar with the clipping libraries that the great newspapers have, are you not, I mean generally? A. Yes. We use them quite a great deal in our work.

Q. Would you say, Mrs. Bucknall, that your own clipping library compared favorably with the clipping libraries of the great metropolitan newspapers? A. Yes, definitely. I had a value placed on same approximately four or five years ago by a member of one of the New York newspapers who was familiar with the cost of such clippings, of the value of such clippings, and he informed me that mine was then worth at least \$500,000.00. Of course, it has grown since then in value very much.

Q. Unless there is something particular you want to add, Mrs. Bucknall, I think that is all. A. May I just say that the blue marks there (indicating) were against a complete request, I mean as asked by one person, but under those blue markers; under the question by the single person, there are, in some cases, as many as 15 to 20 listed. We usually mark them as under one person's request, as naturally we should do.

318. Q. Mrs. Bucknall, Mr. Schwartz correctly reminds me that I haven't got on the record an answer to a question. You have given us the answer by just hearing it. When these requests were made you complied with them, did you not? A. Naturally.

Mr. Pollak: Mr. Cohen, have you got the figures as to the number of these requests?

Mr. Cohen: I counted 75 main requests with many subdivisions under many of the main requests. Some

Nathalie Bucknall—for Defendants—Cross.

of the requests have as many as 10 and 12 subdivisions.

319

The Witness: Yes.

Cross examination by Mr. Driscoll:

Q. You are familiar with the picture Letty Lynton, of course? A. As much as I can remember it now. We have an awful lot of pictures.

Q. Yes. Do you recall that the action opened in this tango barn in Montevideo, that the scene shifted then to the street, the automobile that conveyed the stars, or conveyed Miss Crawford and Ascher, from the tango barn to the hotel, a few scenes in the hotel, and then it goes to the boat in the harbor? A. I remember it vaguely, yes.

320

Q. And from that time on there is no more action in Montevideo. A. Yes.

Q. Everything after that in the picture are scenes on the boat, in New York and in the Adirondacks. A. As I remember it, yes.

Q. That is true, isn't it? A. Yes.

Q. So that the only part of that picture that was in a foreign country was the first few shots; is that true, or isn't it? A. Only according to what you saw in the picture.

Q. Yes. A. But not according to what we had to prepare in it.

321

Q. No. I am just judging the picture from what I saw, what was exhibited to the public, of course. I had no opportunity to see what was prepared. I am talking about the finished picture, and that is the picture that is involved in this law suit. In the finished picture only the first few shots were in Montevideo, and after that the entire picture was either on the steamship, in New York City or at this lodge in the Adirondacks. A. I must repeat again—

Nathalie Bucknall—for Defendants—Re-direct.

Q. Well, isn't that true? A. That is what you see, but—

Q. Isn't that true, Mrs. Bucknall? Am I right, or am I wrong? A. You are right when you see the picture, yes.

Re-direct examination by Mr. Pollak:

Q. Mrs. Bucknall, I will just ask you one question. I take it you are generally familiar with the arts, and it is unnecessary to ask, aren't you? A. With what?

Q. With the arts. A. Yes; naturally.

Q. With painting, writing and the other arts? A. Yes.

Q. I take it that you would give as your judgment, would you not, that in any art the fundamental process is the selection of what to include and what to exclude; that is true, isn't it? A. Yes.

Q. Is it true in connection with a picture that a vast amount of research goes into scenes that are considered at one time and then rejected partly after research is made?

Mr. Driscoll: We will concede that that is true.

The Witness: Yes, definitely.

Mr. Driscoll: It has to be true.

By Mr. Pollak:

Q. The scenes may be rejected partly because research shows that for some reason or another a particular incident or locale is not available, is that right? A. Oh, yes, or sometimes they may be photographed and eliminated from the picture after the picture is cut.

Mr. Pollak: That is all, Mrs. Bucknall. Thank you very much.

(Witness excused.)

CEDRIC GIBBONS, having been first duly sworn, took the stand and testified as follows:

325

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Cedric Gibbons.

Q. Mr. Gibbons, what is your position with the Defendant Metro-Goldwyn-Mayer? A. Supervising Arts Director.

Mr. Driscoll: What was that?

(The answer was read by the Reporter.)

By Mr. Pollak:

Q. Did you hold the same position in 1932? A. Yes.

326

Q. Go right ahead. A. Since 1918.

Q. Since 1918? A. No, on this lot since 1918, but from the beginning of the amalgamation of M-G-M, when they started.

Q. I see. What was your training in the arts, Mr. Gibbons? A. General training in architecture and painting.

Q. Now, what are the functions of the Art Department? A. To provide a background for all the scenes that are shot in the picture, whether it is an exterior or an interior.

Q. By a background, you mean the design of the scenes? A. Yes.

Q. That is entirely in your charge? A. Yes.

Q. How large, roughly, was the department in 1932?

327

A. The immediate department, you mean, the drafting room and the Art Department generally, or the departments that the Art Department controls?

Q. Well, the immediate department. A. Oh, I would say about 40 draftsmen, about 10 unit Art Directors, two assistants.

Q. A unit Art Director is an Art Director assigned to a specific production; is that correct? A. Yes.

Q. Now, what were the departments subject to the control of the Art Department in 1932? A. The miniature

Cedric Gibbons—for Defendants—Direct.

328 department, the process department, the Newcombe department, construction department, plaster department, prop department, set dressing department, and so forth.

Q. Well, do you mind explaining the "so forth"? A. Well, when I say miniature department I mean there are many things that have to be done in miniature that sometimes require work from another department which is not really under the control of, but during that time it is under the control of the Art Department, because the Art Department is asking them to do something the way the Art Department wants it done.

329 Q. The miniature department, in a general way, has been explained to us. It is the department that takes pictures from miniatures, is that right? A. Yes. They do a scene in miniature which would be too expensive to do in full size.

Q. Now, taking the departments that were subordinate to the Art Department in 1932 as you have outlined them, how large would the Art Department be on that basis? A. You mean in number of people?

Q. Yes, in round figures. A. I would say around 800 or 900.

Q. Can you give us, in general terms, a statement of the types of artists that are included in the Art Department?

330 A. Well, painting, sculpture, wood-carving, architecture, photography, if that is called an art, I don't know. That is all.

Q. The dressing of sets is under the control of the Art Department, is it? A. Yes.

Q. By the dressing, I understand you to mean the garnishing of the sets after there has been physical construction of them, is that right? A. Yes. That may mean anything. That may mean planting trees, or moving rocks around, or something like that.

Q. By the way, in your statement of the arts you mentioned architecture in general terms. That would include landscape architecture? A. Yes.

Cedric Gibbons—for Defendants—Direct.

Q. And you have men experienced in landscape archi- 331
 tecture specifically? A. Yes.

Q. And architecture would also include, I suppose, in-
 terior decoration? A. Oh, yes.

Q. And you have experts in that field? A. Yes.

Q. And, in a general way, all these answers, I take it,
 apply to 1932 as well as to now? A. Yes.

Q. Now, do you also design the costumes in your de-
 partment? A. No.

Q. You do not? A. No.

Q. That would be in which department, wardrobe? A.
 Wardrobe Department.

Q. Do you happen to know how many sets were actually 332
 used in the picture Letty Lynton? A. No, I don't know,
 but I imagine they averaged, a picture of that sort is
 somewheres around 45.

Q. Well, my information is that it was 32. A. That is
 probably it.

Q. Subject to correction, may we state it that way? A.
 Well, there is a difference in figuring those things. You
 can figure a set as each individual room, but where you
 have a hotel, maybe there is a bedroom and a bathroom and
 a corridor and sitting rooms and several things like that.
 They can be listed as separate sets, or grouped if we put
 them together as one set. I will say, for instance, Lynton's
 house in the Adirondacks was the interior of that, and 333
 then there was the exterior. That was called one set.

Q. I see. A. We put them together.

Mr. Driscoll: And the room upstairs in the same
 house.

The Witness: Yes. That was not together. The
 hallway and the exterior downstairs where the
 sleigh came up, or the carriage or motor car, I have
 forgotten.

Mr. Driscoll: The sleigh, and the scene at the
 fireplace, and the scene upstairs.

Nat W. Finston—for Defendants—Direct.

334

The Witness: So the one upstairs would be one set, and the two sets downstairs would be called one set.

By Mr. Pollak:

Q. Of course, your department was continuously and actively engaged in the production of Letty Lynton, was it not? A. Yes.

Mr. Pollak: That is all for me, Mr. Gibbons. Have you any questions?

335

Mr. Driscoll: No questions, Mr. Gibbons.
(Witness excused.)

NAT W. FINSTON, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your name? A. Nat W. Finston.

Q. Mr. Finston, what is your position with Metro-Goldwyn-Mayer? A. Director of the Department of Music.

336

Q. Did you hold that position in 1932? A. Not in this studio. I did, but not in this studio.

Q. But not with M-G-M? A. No.

Q. Were you familiar with the organization of the Music Department of M-G-M in 1932? A. Yes.

Q. Mr. Finston, tell us what the functions of the Music Department in a motion picture studio are, in your own way? A. We select music, we write it, we orchestrate, we compose, we paraphrase, we clear.

Q. What does clear mean? A. Securing permission or legal rights based on certain compensation, to be permitted to use certain compositions that would be restricted other-

Nat W. Finston—for Defendants—Direct.

wise. We have orchestras, conductors, song writers, lyric writers, all actively engaged on the music of every production we do. 337

Q. Roughly, how large is the organization now, the Music Department? A. When the orchestras come in we might have over 100 people in a week. Without the orchestras you will have a residence or stock music department of about 60 to 70 people constantly.

Q. And what types of musicians would be included in your regular resident department? A. Song writers, lyric writers, conductors, scorers, orchestrators, adapters, all musical service outside of the actual orchestral performances. 338

Q. The orchestral performances would be under your jurisdiction when you are having them? A. Yes, sir.

Q. And, of course, the studio makes use of orchestral performances when necessary? A. Constantly.

Q. What kind of performing musicians are included in the Music Department when the orchestras function, for instance? A. All symphonic, operatic, standard works are performed during those sessions.

Q. Well, it is certainly true, is it not, that the studio includes in its staff practically every type of musician or musical performer, is that not so? A. It has to be.

Q. It has to be. The whole field of musical art is included in the studio's operation? A. It has to be. 339

Q. And this was true essentially in 1932? A. Definitely.

Q. You have song writers of your own? A. Yes.

Q. Regularly employed? A. Yes.

Q. How about dance directors? A. Yes, we have about six of them now.

Q. And were there dance directors, if you know, in 1932? A. Oh, yes.

Q. Here at M-G-M? A. Yes.

Q. Do you conduct any form of music research? A. Constantly.

Nat W. Finston—for Defendants—Direct.

340. Q. Would you explain that in general terms? A. Well, in going over a script or looking at a picture for the first time it is necessary to get your geography, your histrionics, everything in connection with music.

Q. That somewhat arrests me. How do you have to get your geography in connection with music? A. Study the period, the year, you study the place, the locale in your picture. It makes a difference then whether your picture musically is in Ireland or Jerusalem or New York City.

Q. In other words, the incidental music would have to be consistent with the time and place? A. Yes, sir.

Q. Take an extreme case. You couldn't throw in a song that had been written 10 years after the date of the picture?

341. A. No.

Q. Or a song that just didn't happen to be sung in South America, let us say? A. Yes.

Q. Have you a building of your own for your department? A. Yes.

Q. By the way, you have the selection, I suppose, of the subordinates under you, don't you? A. Yes.

Q. And the general administrative work of a pretty large department, although it is an artistic department? A. Yes.

Q. I think the general picture is clear enough, and I have nothing more, unless you want to add some further explanation of your department. A. No.

342. Q. I just want to get this clear. Essentially, from your knowledge, what you have said of the present Music Department of the defendant M-G-M was true in 1932, wasn't it? A. Oh, yes. No picture can be musicalized without a department, without a set-up, they just can't be.

Q. Without an inclusive, specialized organization created for musicalizing in connection with motion pictures, is that right? A. Yes.

Mr. Pollak: Any cross examination, Mr. Driscoll?

Mr. Driscoll: Not a bit.

(Witness excused.)

LAWRENCE KEETHE, having been first duly sworn, took the stand and testified as follows:

343

Direct examination by Mr. Pollak:

Q. Will you state your name? A. Lawrence Keethe.

Q. Mr. Keethe, what is your present occupation? A. In charge of the Wardrobe Department.

Q. Of Metro-Goldwyn-Mayer? A. Yes, sir.

Q. Were you connected with that department in 1932? A. Yes, sir.

Q. Were you then the head of it? A. I was the assistant.

Q. I see. And who was then the head? A. Mr. Joe Rapf, R-a-p-f.

Q. Who, I understand, has been ill of late? A. Yes.

344

Q. At all events you are thoroughly familiar with it, of course, in 1932? A. Yes, sir.

Q. Will you tell us in your own way, Mr. Keethe, what the functions of the Wardrobe Department are? A. Well, we get a script. Then we break it down. By breaking it down we read through it and see how many changes of wardrobe are required for the artists. After we make the break-down, as we call it, we turn it over to our designers. Then, in turn, the designer also reads the script and then makes his sketches from the break-down.

Q. The designer would be a member of your department? A. Yes, sir.

345

Q. I see. The designer in this particular picture, I believe, Letty Lynton, was a Mr. Adrian, is that right? A. Yes, sir.

Q. And he is a very distinguished designer, isn't he? A. Very much.

Q. Go ahead. I am sorry to have interrupted you. A. So then he makes the sketches and gets in touch with the artists, who was Miss Crawford in this case, then also gets in touch with the producer and the director. They all get together to decide on the certain type of gown. Then he

Lawrence Keethe—for Defendants—Direct.

316 puts it into work, and we make what they call a muslin pattern first.

Q. A what? A. A muslin pattern.

Q. I beg your pardon. A. Then he tries it on the artiste, and if he doesn't like that pattern, he makes another one, in other words, to get the type of gown which would fit her the most suitably. Then the gown, after the pattern is okayed, is put into work. Then we cut into the material.

Q. In other words, your department designs all the costumes? A. Yes, sir.

Q. A great many costumes you actually have in stock, have you not? A. We do, yes.

317 Q. Are they under the supervision of your department? A. Yes, sir.

Q. And I suppose a problem at once is whether a given costume is available for a picture? A. That is right.

Q. I suppose, self-evidently, that a costume for a leading character always has to be made to fit that person? A. That is right.

Q. How large is your department, how large was it in 1932, roughly? A. Well, I would say around 300.

Q. That includes designers? A. Designers, seamstresses and wardrobe help, and issue clerks, and so forth.

Q. Of course, the mechanical execution of the designs, once they have been drawn by the designers, would go to a mass of assistants? A. That is right.

318 Q. Who would be the principal officials of the Wardrobe Department, what would you call them? A. Well—

Q. You were the assistant under the head. What others were there? A. The assistants that would work with Adrian in connection with the construction of the gowns, you mean?

Q. Well, taking the organization of your department, how many subdivisions were there, or were there any, I don't know. I mean, are there sub-department heads? A. Well, we just have the assistant to me, you know.

Lawrence Keethe—for Defendants—Direct.

Q. I see. A. That would be all.

349

Q. How many designers would you have? A. Well, at that time we had, I believe, two designers, Adrian and I believe Dolly Tree was with us then.

Q. With assistants of their own? A. With assistants of their own, yes.

Q. Roughly, how large is your stock of wardrobe? A. You mean in valuation, or garments that we have there?

Q. Well, say the garments that you have there. A. That would run up into the thousands of garments.

Q. And it would have run up that high in 1932, also? A. Oh, yes.

Q. By the way, you have been telling us about the gowns that you design for female characters, and I suppose they naturally hold the championship. If it is a question of the costumes of the men, you have to look after that too?

350

A. Oh, yes.

Q. Including the costumes that obviously have to be specially designed of historical character or characters remote in place and costume, not here used, and so forth?

A. Yes, sir.

Q. That whole field? A. Yes, sir.

Q. Have you anything that you feel you would like to add, or let me ask, is the repair of costumes in your charge?

A. I don't quite get you.

Q. The repair of costumes. A. Oh, yes, anything pertaining to gowns, costumes, or anything.

351

Q. That is, if any costumes are used? A. Yes, sir.

Q. And naturally, if more or less worn out, they have to be repaired for a second use, if there is such a use? A. That is right, yes, sir.

Q. Including a second use that may come in some quite different production, is that right? A. Yes, sir.

Q. You salvage what costumes you can salvage? A. That is right.

Q. That is all in your department? A. Yes, sir.

Daniel Gray—for Defendants—Direct.

352 Q. Does the Art Department instruct you as to what costumes they want? A. No. The only time that we come in contact with the Art Department is in the case of a set that might be, we will say, painted dark, and we will kind of get together and we will put a light gown in there in order to balance it up. That is the only time we get in touch with the Art Department.

Q. It is the producer who lets you know what he wants, is that it? A. Well, between the producer and the star and the director.

Q. I see. A. We get the three of them together and let them decide upon what they think would be the most suitable for the part.

353 Q. That is in general? A. In general.

Q. Then the actual designing is in the hands of the designer? A. Yes, sir.

Q. After the character of the costume has been determined by the various authorities, whatever they are? A. Yes, sir.

Mr. Pollak: I think that is all, unless you have something, Mr. Driscoll.

Mr. Driscoll: No.

(Witness excused.)

354

DANIEL GRAY, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. What is your name? A. Daniel Gray.

Q. What is your position with Metro-Goldwyn-Mayer? A. Editorial Chief.

Q. And by editorial, you mean editorial in the cutting, in the film cutting department, is that right? A. Yes, sir.

Daniel Gray—for Defendants—Direct.

Q: You have nothing to do with the writing? A. No. 355

Q. Or revision of pictures? A. No.

Q. Just to clear that up, it is not what we outside of the industry think of as editorial work? A. No.

Q. I suppose as an incident to revising the film, you may have to have revision of the text too, is that not so? A. That is right.

Q. Now, will you explain what the function of the editorial and cutting department—do you call it both? A. Yes.

Q. Will you tell us what that is? This is technical and important, and you can make this fairly full, Mr. Gray, if you will, please. A. Well, it is the same as every other department. A script of a picture is submitted that goes into production. That script we read. We go through it and see if there is anything suitable that we might have in stock to save in the cost of production, such as a railroad train, or ferry-boat whistle, to save time in the shooting production. We read that script and we work in conjunction with the director. We keep a picture cut right up to date, daily. What I mean by daily is, the director shoots a picture yesterday. We get those dailies today and we run them, screen them, break them down and select with the director what we think is the best take of a day. For example, a director might make five scenes in one take. We make a selection. That selection is the choice take which the director thinks, and what the particular cutter I might assign to that picture thinks, would be suitable for the story. Lots of times they make mistakes in the dialogue and we take a corrected take. From there it goes into a continuity room where we make a daily continuity of each individual scene, of the very lines of dialogue that is spoken on the set. We need that for editorial purposes when we get into the cutting of a picture. Of course, after we have a picture assembled and the director finishes, it might run into approximately 15,000

356

357

"Daniel Gray—for Defendants—Direct."

358 feet of the first cut. Then we figure a picture is too long to go out to the public in that footage. So then we work with the director and the producer on that particular picture and we make all the eliminations possible to keep the story intact in the least footage we possibly can get to the public. These continuity sheets help us a great deal in that work.

Q. Tell us what a continuity sheet is. A. Well, a continuity sheet is just a typewritten sheet that we keep on every individual scene that is made on the set. The script might call for certain lines. When they get onto the stage the director might think, well, if we add a few lines, or eliminate a few lines, it doesn't correspond with the particular script. I mean they make slight changes while they work during the progress of a picture. But we have an actual individual scene continuity which we cut the picture from, including the script.

Q. In other words, a director may change the actual expression on the set, is that right? A. That is correct.

Q. Slightly? A. Yes, very slightly.

Q. That is, the original may be, "Ethel, there you are," and it becomes, "Ethel, you are there"? A. That is correct.

Q. Using that as an illustration. A. Just minor changes, but we have to keep them together. Every individual word that is spoken is on a daily continuity sheet, so when we make eliminations we probably will go back and eliminate one sentence from one scene to blend with one sentence of another scene, and probably cut out a portion of it in the final editing of the picture.

Q. And this you do each night as you get the dailies of that day's production? A. That is correct.

Q. That is right? A. That is right.

Q. Pardon me. Go ahead. A. In shooting a scene, the director will probably open up on a long shot of a set.

Q. Tell us what a long shot is. A. Well, a long shot of a set, I will take, for example, this courtroom.

Daniel Gray—for Defendants—Direct.

Q. Yes. A. The shooting of a courtroom sequence. You shoot a long shot of all of us characters just as we are sitting here. Then he will move in and shoot a semi-closeup in group formation of the same particular shot, in other words, only doing the same action all the way through in a semi-closeup shot. Then he will move in and do the same thing in the individual shot, which we call a closeup. When we get that for construction to put onto the screen, we probably will establish our location with a long shot of a court room. Then, for example, if I am on the witness stand and you are the attorney, you ask me a question. We might go to a semi-closeup of you asking me a certain question in the court. Then they will cut to a closeup of me responding to you. So we keep moving into the continuity.

361

Q. And cutting means literally cutting some of the film out, is that right? A. That is right. In other words, if they go through a continuity sheet—

362

Q. Well, let me interrupt. What does cutting mean, exactly? A. What does cutting mean?

Mr. Schwartz: And editing.

By Mr. Pollak:

Q. It is the arrangement, in sequence of the material, is that right? A. And construction of the story to the screen for the public.

363

Q. And, of course, the actual elimination of a great deal that comes in sort of diffuse version, is that right? A. That is correct.

Q. Mr. Schwartz understands this much better than I do. A. You didn't let me finish.

Q. Go ahead. A. I was just going to go back over it. Now, for example, they shoot a long shot of a courtroom. It might run around 200 feet.

Q. Yes. A. All right. Then we move in to shoot the semi-closeup of the same action in 200 feet.

Daniel Gray—for Defendants—Direct.

364

Q. Yes. A. Then we move in and shoot an individual closeup of the same action in 200 feet. In other words, we have 600 feet, but when we put it together for the screen it will probably wind up to be 150 feet in sequence of a courtroom. In other words, we eliminate approximately 450 feet.

Q. This you do in conjunction with the director each night? A. Yes, sir.

Q. And the producer too? A. Plenty.

Q. What do you do, assign a cutter to each production?

A. Assign a cutter and an assistant cutter to each production.

365

Q. And you are generally familiar with the whole process of cutting in all the productions? A. Yes, sir.

Q. How large was your organization in 1932? A. My whole department, including cutters and office staff?

Q. Yes. A. Forty-five, approximately.

Q. Well, given the fact that the particular art here involved is motion pictures and not writing, the word "editor" is exactly correct, isn't it? You really do edit the material? A. That is correct.

Q. The film? A. Yes.

Q. You revise it and determine its final form? A. Yes.

Q. Of course, in conjunction with the producer and the director? A. Yes, sir.

366

Q. But you take pictures that other persons have made and determine which are to be produced really of the particular shots? A. Yes, sir.

Q. I suppose the devices and machines you have are almost legion, aren't they? A. Yes, sir, they are.

Q. Have you a film library? A. Yes, sir.

Q. Can you give us some idea of the dimensions of the film library, the number of films you had in 1932? A. Well, I would say around, a rough guess of around 6,000,000 feet.

Q. These are the things you carry in stock, is that right?

A. Yes, sir.

Daniel Gray—for Defendants—Direct.

Q. There is, for instance, a stock picture of a thunder storm in the woods? A. We keep that, yes, sir. 367

Q. 6,000,000 feet you had, you think, in 1922? A. Yes.

Q. How many librarians do you have for this film library, or did you have in 1932, as nearly as you can recall it? A. Six.

Q. Well, let me ask you one thing more about this cutting and editing business. You have previews of your pictures, don't you? A. Yes, sir.

Q. And if, on the preview, some features of the film seem undesirable, you may start the process of editing over again? A. Yes, sir, many times.

Q. Many times. You must send somebody to every preview? A. I send two people to every preview. 368

Q. You send two people to every preview? A. Yes, sir, a cutter and an assistant cutter and myself. I always attend every preview we have.

Q. You attend every preview? A. Yes, sir.

Q. In other words, the process of at least possible revision and editing goes on even after production has been finished, up to the preview? A. Oh, yes, quite a bit.

Q. Because production may then have to be resumed after the preview? A. Yes.

Q. If changes are required? A. Yes, sir.

Q. You have told us how many employees you had in the whole department in '32, didn't you, in round numbers? A. Round numbers, roughly speaking, around 45. 369

Mr. Pollak: Have you any questions, Mr. Driscoll?

Mr. Driscoll: No.

(Witness excused.)

370 MARCELLA NAPP, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your name? A. Marcella Napp.

Q. Miss Napp, what is your position with the department? A. Assistant Casting Director.

Q. The Chief Casting Director is Mr. Datig? A. Yes.

Q. What was your position in 1932? A. Assistant Casting Director.

371 Q. And would you tell us, in a general way, what the functions of the Casting Department are? A. Yes. Our duties are to select talent for the various pictures that are produced. We read a script which is submitted, for breaking down of characters needed in the picture, and then, of course, we attempt to cast them for the proper characters.

Q. You wouldn't cast the stars, would you, or would you? A. No. The stars are usually cast before we get the script.

Q. But you are told that there is needed, say, a good Irish character actor? A. We cast everything. We cast all the featured players right down through to the extras needed in the picture.

Q. From featured players through to the extras, but excluding stars? A. Excluding stars.

372 Q. And would you mind explaining, for the sake of the record, what the difference between a star player and a featured player is? A. A star player is usually the player that carries the picture, the top name in the picture. For example, Wallace Berry is a star in a picture. Usually the picture is written around that character and he plays the main character in it. All the other players are just—what shall I say—

Mr. Driscoll: Supporting cast?

The Witness: Supporting cast and subordinate to the star. The star, of course, is the one that gets the top billing and everything else in the cast.

Marcella Napp—for Defendants—Direct.

373

By Mr. Pollak: —

Q. Well, the top billing means just exactly that? A. Yes, sir.

Q. His name appears before the name of the picture in the billing, is that so? A. Yes, usually.

Q. Well, for instance, you see Joan Crawford and Robert Montgomery in "Letty Lynton," using that as an illustration? A. That is right.

Q. Then the featured players would be named after the name of the picture? A. That is right.

Q. And the featured players may be players of great importance? A. Yes, and usually playing very important parts in the picture.

374

Q. That is what I mean. A. Yes.

Q. Including the great character parts and other supporting parts? A. Yes, indeed.

Q. Now, when the picture has been broken down, as you put it, for casting, what do you do about it? Where do you get your actors from? A. Well, we usually line up all the actors and actresses that we know would suit or fit that part that are either in Hollywood or in New York, or sometimes they are brought from England, and we submit their names. When they are definitely okayed for the parts—by testing usually, or just being well known enough, you see, for the producer and director to agree upon that actor for that character—they are brought either to Hollywood from New York or Europe or directly from Hollywood. They might already be here.

375

Q. The producer and director have the final say as to what featured players they want? A. Yes.

Q. Tell us about this testing business. What does that mean? A. Characters usually are tested for a production. We will take a well known actor, an actor that has been in pictures.

Q. Yes. A. And is fairly well known. He is brought out to test for either makeup or certain wardrobe costuming

Marcella Napp—for Defendants—Direct.

376 that he has never done before just to determine his ability to play a certain type of characterization. The testing of an unknown, of course, is very, very involved, and we usually start with bringing them to the studio, having the test director give him some lines and dialogue which they study and rehearse several days prior to the making of the test. They are taken to the makeup department and makeup is gone over. Perhaps they are tested just with silent makeup tests to determine which is the best makeup to use for them, you see. Then, of course, they learn the dialogue after several days' rehearsal perhaps with one or two other players who are given their time, and the test is made after, of course, wardrobe and everything is suitable. The test is made, and then we all look at it to determine whether or not that player is someone we can use. If not, they are discarded.

Q. What does the test consist of, how is it done? A. How is it done?

Q. Yes. A. Well, do you mean the actual shooting of the test?

Q. Well, what I mean is this: Is the result determined by what the picture shows, or by what you think of the man, or a little of both? A. Well, usually by the personality that comes through on the screen.

378 Q. I suppose there also must be consideration of this: This fellow has tested pretty well, this girl has tested pretty well, but there is a chance of a much greater development? A. Yes. There is some spark of something that we call screen personality. Many, many tests are made to bring that out. Often those aren't enough to determine the worth of a player like that.

Q. That is, it is a subtle and, I suppose, intuitive process of personality judgment that is involved in your work? A. Yes, indeed.

Q. Probably it is very hard to explain to anybody how you do it, but you have kind of a flare for it, if you are not too modest, is that right? A. That is so.

Marcella Napp—for Defendants—Direct.

Q. You must also, besides getting actors from Hollywood or New York or London or Vienna, or whatnot, you have a reservoir of actors of your own here under contract? A. Yes, our stock company, which is very great. 379

Q. Roughly, what was the size of your stock company in 1932? A. Well, if I can remember, I think it was about, I think we had about 79 or 80 contract players. That didn't include the stock players that are on a week-to-week basis, boys and girls non-contract that we carry.

Q. How many of them did you have in 1932? A. I should imagine in 1932—

Q. In round numbers. A. —very roughly, about 50.

Q. And then in addition to them, you might hire people from anywhere? A. Oh, yes, indeed. 380

Q. Would you hire persons from abroad that hadn't been tested at all? A. Well, usually after a test has been made abroad and it wasn't exactly what it should have been and yet, as I say, there was a certain personality that came through on the screen. Or, they might have made a foreign film, and then we bring them over here sometimes just for a series of tests and, of course, all their expenses are paid to Hollywood, and all their living expenses while here. Often-times they speak a little English and we have to get teachers for them, put them through a series of extensive training before they even make the test.

Q. Do you conduct a school of motion picture acting? A. No, but we have various departments along those lines. For example, we have the dramatic coaches. We have diction teachers and instructors. We have school teachers. We have chaperons that just teach them nothing but English when they come over here. 381

Q. That is a function I had never thought of in connection with a chaperon. A. Well, they are with them, either speaking French or Viennese, or whatever the girl might be, the teachers are right with them all along.

Q. I see. A. To teach them English.

Q. Tell us a few names of foreign actresses that you have

Margella Napp—for Defendants—Direct.

382 taught English to? A. Luise Rainer. We have now with us a woman named Korjus, Deila Lind, who is now with us. I can't think of them all offhand. There are several.

Q. Your company has been giving long M-G-M cheers right now for the fact that Miss Rainer won the award as the best film actress of last year? A. So I understand.

Q. From the Academy, is that right?

Mr. Driscoll: Wasn't it the best performance, instead of the best film actress?

The Witness: The best performance.

By Mr. Pollak:

383 Q. And M-G-M is giving still more enthusiastic cheers? A. Of course.

Q. Miss Napp, if, for instance, a mob is required, how do you get after that? You don't make special tests of those people? A. No. Those are called extras. They are hired through the Central Casting Corporation, the Bureau. We pay toward its upkeep, you see.

Q. That is maintained jointly by the various producers? A. Yes, but of course we pay for it, naturally.

Q. You tell Central Casting that you want 17 Roman centurions, say, and they get you fellows for that? A. Yes.

384 Q. Do you explain to the Casting Bureau what sort of costumes they have to wear? A. No. The costumes are furnished by the studio, unless it is modern dress, otherwise the costumes are furnished by us.

Q. And I suppose you have to explain that you need fellows that look like Roman centurions? A. Yes, indeed. We explain the type needed, and they send them over. Many times we have interviews for certain types of people like that. In fact, nine times out of ten we interview them for period or costume pictures.

Q. And all that you are telling me was essentially true in 1932? A. Yes. It has existed for as long as I can remember.

Marcella Napp—for Defendants—Direct.

Q. Do you have a separate Casting Director for each production? A. No. 385

Q. Whatever the title may be. A. No. I think there are 14 people in the office at the present moment. We all do the same type of work, you see, we can all do everything necessary in the office, but there are some assistants that just take care of these extras, as we say, the calling of extras, getting certain types of interviews, and everything straightened out. There are two assistants that take care of bits, bit part players.

Q. Do you conduct a kind of continuous research of who the effective actors on the screen are, as, for instance, by watching screen performances? A. Oh, yes, indeed. We see several pictures a week. We see at least six and eight pictures a week. You see, the entire casting office is required to go to these different showings that we have at various places, the Filmart Theatre, for example. We pay so much a week for the casting office to be permitted to go to see various pictures. Of course, then there are all the different places, all the way down to the little theatres that are completely covered at all times by different members of the casting office. Pictures are brought out here for us to see at the studio for a certain type of work that an actor has done that we are not familiar with. They bring pictures out that might have been made at another studio and we run it to see what type he has played in that particular picture. 386

Q. Now, if you find a promising actor that has some slight defect or an actress, if she is a little too thin or too stout, do you physically recondition them at all? A. Oh, yes, indeed. A great deal of that work has been done. We have physical instructors. We have masseurs and masseuse. We have dental work done. We have facelifting. 387

Q. Do you have dentists of your own, or a dentist? A. We have a dentist here on the lot, and caps are made for teeth that aren't perfect. Whole sets of teeth are made lots of times.

Marcella Napp—for Defendants—Direct.

388

Mr. Schwartz: And noses straightened?

The Witness: Of course, hair is fixed and made different colors. That is all in the makeup department. Wigs are made, and different things like that.

By Mr. Pollak:

Q. Most of these mechanical acts are done through other departments at your suggestion? A. Yes. Of course, it all comes through with orders from our department, naturally, all charged to our department.

389

Q. I see. How large did you say the department was in 1932, or haven't you told us? A. I believe there were about 10.

Q. That is, specifically in your department? A. Ten.

Q. The work being done, in many instances, through other departments? Take these chaperons, for instance. Would they be under your department? A. Yes, they would be.

Q. I see. Well, in the 10, does that include all— A. No, that includes just the members of our department, the testing department. Of course, there are school teachers that come under our supervision, and chaperons, and singing teachers.

390

Q. The school teachers are brought in for the young child actors? A. Yes.

Q. That must be given instructions? A. We must have a school teacher here at all times, and a welfare worker for anyone under 18 years of age working in a picture, on a set.

Q. By the way, do you select dancers too? A. No, that is done through the Music Department.

Q. What provision do you make for illness? A. We send doctors out to any members of the cast either before or during a production. For example, an actor or actress is supposed to start a picture on Monday and Saturday afternoon we find that they are ill with the flu or something.

Marcella Napp—for Defendants—Direct.

We immediately send our doctor out to determine whether or not they will be available on the day we need them. Often doctors have gone out on the sets to stay with an actor, or nurses have been required to stay with actors and actresses while they have been working on sets.

Q. Supplied by you? A. Yes, by us.

Q. Well, now, counting all the persons, not merely the 10 chiefs and the immediate subordinates that you have been talking about, counting all the persons under your department, how many were there in 1932? A. Well, I would say between 15 and 20.

Q. You mean that includes the chaperons and teachers?

A. Yes.

Q. I am informed—and I may be just all wrong—that in 1932 the doctors were hired by your department. It doesn't make much difference. A. Well, I may have forgotten. I think they were at that time. Yes, the Music Department did not handle them at that time.

Q. And whoever handled them, the process of selection, I suppose, was essentially much the same as with actors, pure and simple? A. Yes; indeed.

Q. Although their physical constitutions, that of the dancers, might be particularly important? A. Yes, indeed. Naturally, when they come out on an interview, we will say, they are a little bit more particular about the selection, probably. They might have more interviews on the dancers that come out than with just regular actors and actresses for certain types of dance work that are required.

Q. How many persons have to be present to make a test? A. Outside of the actors, you mean? There is the test director, the cameraman. I don't know how many electricians are required. Then if music is required in the test there is an orchestra, and I imagine that is about all on the set.

Q. A single test may be quite an expensive process? A. Oh, yes, they are. They are very expensive.

391.

392.

393.

Edith Louise Farrell—for Defendants—Direct.

394 Q. Have you any figure of what a single test costs? A. No, I haven't exactly, upwards, I would say, of \$500.00, and that is just for a short test.

Q. For a single test of an actor? A. Yes.

Mr. Pollak: Mr. Driscoll, have you any questions?

Mr. Driscoll: No.

By Mr. Pollak:

395 Q. Have you anything you want to add to the description of your department's work, Miss Napp? A. I can't think of anything, unless there are some questions you would like to ask me.

Mr. Pollak: No, I believe that is all. Thank you.

(Witness excused.)

EDITH LOUISE FARRELL, having been first duly sworn, took the stand and testified as follows:

Direct examination By Mr. Pollak:

Q. Will you state your name? A. Edith Louise Farrell.

Q. Is it Miss or Mrs.? A. Miss.

396 Q. Miss Farrell, what is your post with Metro-Goldwyn-Mayer? A. Head of the Stenographic Department, which consists of a clearing house for stenographers and secretaries on the lot, a file containing all the stories we own, produced and unproduced.

Q. I didn't quite hear that. A. File consisting of stories owned, both produced and unproduced, mimeograph work, fan mail.

Q. How large was your department in 1932, roughly? A. It varies when we are not busy, but I should say around 45. It goes up to 125.

Edith Louise Farrell—for Defendants—Direct.

Q. Miss Farrell, can you tell us about this file of stories that you have? A. Well, it is a file that came to the studio when the three studios amalgamated in 1924.

Q. I see. It is simply a record, sort of a library of the stories you have? A. Yes.

Q. Now, the stenographic work, I suppose, while very voluminous, is not so very different from stenographic work in any other large establishment, or is it? A. It is quite considerably different, yes. A great deal more is required of these girls, both in background and hours and tact, discretion, it is quite different from working for a business concern.

Q. And you supply stenographers for all the different departments? A. Yes.

Q. Are the secretaries of the different executives and writers under your jurisdiction, or are they separate? A. No, they go on another payroll.

Q. They go on another payroll? A. Yes.

Q. What is movie-ola work? That is a phrase that means nothing to me. A. I forgot that. We used to have script girls on the set who wrote down the dialogue, everything as it was shot, for all the various takes, correcting mistakes that were made, an actor not remembering his lines. Now with the dailies, everything that is shot every day is sent to this room and the members of that department write down the action of the scene and the dialogue.

Q. That is done every day right after it is shot? A. Yes.

Q. Was that substantially true in 1932? A. Yes.

Q. What is this fan mail business? A. Well, certain mail comes in to the department, to stars, I should say, which must be taken care of. If it is money, it must be opened and some answer given, and the money returned, or stamps returned, questions answered and packages received and sent back. Sometimes it is in the star's contract that the studio pays for certain things. Sometimes the star pays for certain things. It costs a great deal of money.

Floyd L. Hendrickson—for Defendants—Direct.

400

Q. In a general way, I suppose the purpose of it is to keep on good terms with the admirers of the stars, or the purpose is to keep in good humor the clientele of the different stars, is that right? A. Yes, a matter of advertising and publicity.

Q. Do you get many requests for pictures, for instance, of the stars? A. Well, that is essentially what this mail consists of.

401

Q. What do you do about that? A. Answer it according to how the star's mail is to be taken care of. If the studio has made an arrangement whereby we take care of the fan mail, it is taken care of by the studio. Otherwise it is taken care of in the department for the star, in charge of the star.

Mr. Pollak: I think that is all, unless you have something.

Mr. Driscoll: Not a question.
(Witness excused.)

FLOYD L. HENDRICKSON, having been first duly sworn, took the stand and testified as follows:

402

Direct examination by Mr. Pollak:

Q. What is your name? A. Floyd L. Hendrickson.

Q. What was your position in 1932, Mr. Hendrickson?
A. In 1932 I was assistant to M. E. Greenwood.

Q. What was Mr. Greenwood's position? A. Mr. Greenwood was Business Manager in charge of the Contract Department.

Q. Head of the Contract Department? A. That is correct.

Q. And what are the functions of the Contract Department? A. The Contract Department is where we accumu-

Floyd L. Hendrickson—for Defendants—Direct.

late all the information on contracts. We retain all contracts in our files. The information on the contracts originates in the various departments, from the department heads, or executives, who have the authority to make deals. That may come to us merely in figures and terms. If a contract is in any way involved, we refer it to our attorneys down town who prepare the contracts. If it is an ordinary contract, we prepare the contract right in our own office.

403

Q. And your attorneys down town are Loeb, Walker & Loeb? A. Yes.

Q. Now, these contracts include, of course, contracts with the stars, is that right? A. They include contracts with the stars, featured players. We have handled all the building contracts, all story purchase contracts that originate here. They are either referred to our down town office, or are cleared through our department. After the contract is prepared we send out the information to the various departments who are interested in the particular information. We keep a constant check on the contracts, the termination dates, option due dates, and any pertinent data in the contract itself.

404

Q. What is the option due date? Am I right about this, that the general practice is, with a star at least, to hire him on a contract which gives an option of renewal at an advanced rate to the employer? A. That is correct.

405

Q. The contract may have a run of several years, assuming these options are taken up? A. The usual run is seven years.

Q. The California law, Mr. Schwartz tells me, limits the term of a personal service contract to seven years? A. Yes.

Q. You also have to do with the contracts of directors and producers? A. All contracts of any nature go through that department.

Q. And the ordinary contracts of the so-called actors on contract, is that right? A. Yes, that is correct.

Louis F. Kolb—for Defendants—Direct

406

Q. About how many contracts would pass through your department, would you say, in the year 1932, at a minimum? A. Personal service contracts—you mean actors, artists, directors?

Q. Yes. A. It is hard to determine. I would say at least two or three hundred contracts, some of which would be short-term contracts, and some long-term.

Q. That is, the personal service contracts alone, would average about one a business day? A. Yes, I would say so.

Mr. Pollak: I think that is enough.

Mr. Driscoll: No questions.

(Witness excused.)

407

LOUIS F. KOLB, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Kolb, what is your position with Metro-Goldwyn-Mayer? A. Mechanical Superintendent.

Q. Mechanical Superintendent. Are you under the Construction Department? A. No, I am not.

408

Q. Or are you a separate department? A. Separate department.

Q. Mr. Gabourie, if I pronounce his name correctly, has testified that you head right out to the General Manager? A. Yes. That is, the Studio Manager and the Production Manager.

Q. What are the main divisions of the Mechanical Department? A. Well, we have four departments. We classify them in this way, stage lighting, maintenance and construction, we have a machine shop which consists of three different departments, that is, the tin shop, machine shop and the foundry.

Louis F. Kolb—for Defendants—Direct

409

Q. You have an automotive department, or is that not under you? A. Yes, we have an automotive department. I had forgotten that.

Q. And did you have it in 1932? A. Yes.

Q. You were the head in '32 also? A. That is correct.

Q. Now, the whole problem of stage lighting is under your department? A. That is not the actual lighting of the set. We place the equipment, operate the equipment at the direction of the cameraman.

Q. But I mean you supply and repair the mechanical equipment? A. That is correct, yes.

Q. The cameraman tells you how he wants it done? A. Yes.

440

Q. And he acts under the director, producer or production manager? A. Yes.

Q. How large a force, roughly, did you have in 1932? A. Well, it varied some for the amount of production, but I would say the average would be around 250.

Q. Including what types of technical men, Mr. Kolb? A. Well, on the stage lighting we always have a head electrician, and he is really the cameraman's assistant. He also has an assistant, and from then on the men are just the men, the electricians and lamp operators. Now, this is on the stage. In the shop we have first-class mechanics and a foreman in each department.

441

Q. Just to get the record straight, what kind of mechanics are these? These things are all familiar to you, but we want the record to show. A. Well, we have electricians, machinists, blacksmiths, moulders, tinsmiths, automotive mechanics, and, of course, each one of these different departments really specializes. For instance, in the electrical department there are probably six different types of electrical work.

Q. That is just what I wanted to get at. Would you mind telling us? A. A construction man is usually no good on the set and, at the same time, a construction man

Louis F. Kolb—for Defendants—Direct

412 would not be a good maintenance man. So we have to keep covered with men in all departments.

Q. How many hours a day does your organization function? A. We have many men here working 24 hours a day.

Q. In how many shifts? A. Six-hour shifts.

Q. That is four six-hour shifts? A. Four six-hour shifts.

Q. Do you work Sundays too? A. Yes, often.

Q. But not regular? A. Not regular, but we are working pretty nearly every Sunday.

Q. And you regularly work the other six days of the week? A. Yes.

Q. In six-hour shifts? A. That is right.

413 Q. And you have to supply and keep maintained the power in the studio, is that right? A. Yes, sir.

Q. What do the maintenance fellows do? A. Well, there is all this electrical equipment, that has to be intained and repaired. There is a good deal of maintenance in the studio grounds itself. There is a lot of machinery here that has to be maintained. In other words, it takes at least 12 to 15 men a day just maintaining the equipment.

Q. Some of the machinery is extraordinarily specialized machinery, I suppose? A. No, I wouldn't say that, outside of the lighting equipment.

Q. You don't maintain the sound equipment? A. No.

Q. Oh, I see. A. No, I have nothing to do with that.

414 Q. That is a different department? A. Yes.

Q. But you have the general physical maintenance? A. That is right.

Q. Of the organization? A. Yes.

Q. How many foremen have you? A. I have six.

Q. Six foremen? A. There is one in the electrical, on the stage, one in construction and maintenance, power supply, one in the machine shop in the daytime, one in the machine shop at night.

Q. That is substantially it? A. And one in the automotive, and one at night, that is right.

Louis F. Kolb—for Defendants—Direct

Q. And that was substantially the same in '32? A. Just 415
about the same, yes. We haven't changed a great deal.

Q. Well, now, who has charge of the generating plants?
A. Jack Winchester.

Q. The portable? A. Yes.

Q. Is he a subordinate of yours? A. Yes.

Q. What is his title? A. His title is my assistant.

Q. I see. That sounds like a good one. Tell us some-
thing about the pumping equipment. What have you got
to do with that? A. Well, we maintain the pumping equip-
ment. We have a large pumping outfit here that supplies
high-pressure water to our sprinkler system, and when
it is not being used for that, it is being used to produce 416
water effects. It supplies water to our dump tanks for
such scenes as a boat in a rough sea where the waves are
dashing over the boat. It is also used for fire scenes, and
in addition to that we have a lot of portable equipment
for high-pressure work, such things as airplanes on a ram
where the thing has to be raised in the air and movement
is required. We also have pumps for rain effects.

Q. Tell us, for instance, about a picture where you par-
ticipate in the taking of an airplane picture? A. Did you
see Night Flight?

Q. No, I am sorry. A. Mr. Brown made that. We had
an airplane on a ram and the ram was raised up and down
by hydraulic pressure. The movement back and forth was 417
also raised and lowered by hydraulic pressure, and in back
of that was a screen through which the picture was pro-
jected which gave the illusion of the plane flying in the air,
and the movement, of course, was provided by these jacks.

Q. Now, there were actors in the plane? A. Oh, yes.

Q. And they were photographed with this background,
in motion? A. Yes.

Q. In other words, in addition to maintaining this large
plant, your department contributes directly to actual pro-
duction where it is specialized, is that right? A. Yes.

Louis F. Kolb—for Defendants—Direct

418 Q. And these things it also did in '32? A. Yes.

Q. What does the foundry do? A. The foundry makes castings, bronze, aluminum. These castings are machined into parts that are used in the construction of sets, special effects. The foundry is a miniature of a large foundry where the clay is used as a mould and the patterns are made out of wood and placed in this clay, and the mould is separated and later on filled with hot metal from which we get our castings.

Q. For various productions, among other things? A. All for productions.

419 Q. All for productions. The determination of what to cast, for instance, I suppose, comes from, say, the Art Department, or the producer, or director, or somebody? A. Yes. The Art Department supplies prints, a design of everything that is to be built. We build all of our stuff directly from plans.

Q. Now, in your various activities you must employ about every kind of technical skill there is, don't you? A. Well, it is pretty well covered, yes.

Q. I mean that literally. A. We can do almost everything.

Q. Including civil engineers, for instance? A. That comes under the Engineering Department. I haven't anybody that can do that.

420 Q. But both mechanical and electrical? A. That is right, mechanical and electrical.

Mr. Pollak: Have you anything, Mr. Driscoll?

Mr. Driscoll: Not a thing.

By Mr. Pollak:

Q. Was it your department that made the famous rhinoceros? A. Yes. That is, we tried to build one. We spent a good deal of money on that with not much success. We finally found out later that we could buy a tame

Louis F. Kolb—for Defendants—Direct

rhinoceros in Germany and he did the work of our mechanical rhinoceros. 421

Q. Someone told me that you had a wonderful mechanical rhinoceros. A. We did pretty well, but not well enough.

Q. But you do create these artificial devices that are sometimes necessary for use? A. Not only that, we created a very large alligator that was used in Tarzan that was all mechanical.

Q. And he seemed really to simulate a genuine alligator? A. I don't think anybody could detect the difference.

Q. I see. Well, there is probably some reason why an alligator is easier to create than a rhinoceros, but we won't go into that. A. This fellow just didn't have any life in him, that was the reason. 422

Q. By the way, your tin shop, I suppose, among other things, produces roofs for sets? A. Oh, yes. In addition to that we build miniatures of submarines, battleships, they are all very costly. A miniature submarine will run around \$500.00 or \$600.00. It is all handwork. It is almost a jeweler's job.

Q. Then with various photographic devices you magnify pictures from them? A. Yes.

Q. Pictures are magnified from the miniatures? A. That is right.

Mr. Pollak: I think that is all. 423

Cross examination by Mr. Driscoll:

Q. Neither the rhinoceros nor the alligator was used in Letty Lynton, was it? A. No.

Mr. Pollak: If he knows.

Mr. Driscoll: He says no.

(Witness excused.)

424 WILLIAM WALKER SPENCER, having been first duly sworn,
took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Spencer, what is your present position? A. At the present time I am Assistant Purchasing Agent.

Q. And what was your position in 1932? A. In 1932 I was not with M G-M. I was Assistant Purchasing Agent from '23 until '31, when I left their employ and came back again in 1933.

Q. Well, are you familiar with the department as it was conducted in 1932? A. I believe so.

425 Q. And will you describe in general what the Purchasing Department does? A. The function of the Purchasing Department of the studio is practically the same as the Purchasing Department of any large organization. We buy everything that is necessary towards the manufacture and maintaining of all pictures. We have in our general stores 10,000 commodities which we carry at all times. Our function is to replenish and keep those store stocks up, plus the fact that we must buy all materials necessary for the manufacture of pictures at the authorized, qualified requisitions of the technical department heads. We differ just a little bit from the ordinary Purchasing Department of an organization in so far as we have to buy everything that is made, and a lot of things that aren't. We have to have many things made special.

426 Q. Well, will you give us some illustration of that? A. Well, you talked last about the mechanical rhinoceros, and so forth and so on. We have to find the skin, for instance, that would look like a crocodile. We have to find a skin for an elephant, and hair to go on an elephant to look photographically exactly the same thing. We can't buy as other Purchasing Departments do on bid, because in the picture business it is a matter of waiting until the Art Department decides just how they are going to shoot, and

William Walker Spencer—for Defendants—Direct.

we generally buy anything today that they wanted yesterday, so we buy mostly for service. We have to pay a little more money than the average concern might for the same kind of commodity, but that is the matter of having service for the production so it won't be held up.

427

Special Master Auchincloss: Mr. Pollak, this gentleman made a very clear statement of exactly what his department is, and in the interest of time and brevity if you can conduct this examination in that way it will be very helpful.

Mr. Pollak: Yes.

Q. Would you know, roughly, what the purchases amounted to in dollars, we will say, in '31 when you left for a short time?

428

Mr. Driscoll: Haven't those been gone into by the Accounting Department? We have all the figures.

Mr. Pollak: Very well.

Q. You have given us a very good, succinct statement already. Is there anything you would like to add, Mr. Spencer? A. Nothing that I know of. I will be glad to answer any questions that you would like me to answer.

Q. You have to keep, among innumerable other things, the wardrobe replenished? A. Correct.

429

Q. And get some new kind of wardrobe that just never was sold anywhere, or hadn't been sold for 500 years? A. Correct, for every picture.

Mr. Pollak: Is there anything for you, Mr. Driscoll?

Mr. Driscoll: Not a thing.
(Witness excused.)

430 WAYLAND P. HENDRY, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. State your full name? A. Wayland P. Hendry.

Q. And what is your present position? A. Chief of Police, Metro-Goldwyn-Mayer Studio.

Q. Did you hold that same position in 1932? A. I did.

Q. And tell us, rather swiftly, what the duties of your department were in 1932? A. The maintenance of safety and prevention of sabotage or any malicious destroying of properties.

431 Q. Did you have charge of traffic? A. I did.

Special Master Auchincloss: Chief, see if you can copy that last witness.

The Witness: I will be very happy to. I handle the care of the payrolls when they are taken out on location, to the pay office here on the sets; where we have a rather large group, rather than to send them up to the Accounting Department, we pay them on the sets. My men are guards going to the banks four and five times a day with the cashiers where they pick up the money, or go there to make deposits in cash. My men accompany them on all those trips.

432 By Mr. Pollak:

Q. You also have fire protection? A. Fire protection. I did not have in 1932. However, I have it at the moment.

Q. Who had charge of it in '32? A. That came under Mr. Robinson.

Q. Well, to save time, you probably know all about it, will you tell us about it? A. We maintain our own fire department to handle the fire until such time, I believe, as we may need help and call on the Culver City or the Los Angeles equipment.

Wayland P. Hendry—for Defendants—Direct.

Q. You are the Chief of the Culver City Police Department? A. No. I was at one time, but I am not now. 433

Q. Were you in '32? A. No. I was there in '29. I came back here in '29.

Q. But you maintain, anyway, a complete police and fire department? A. I do.

Q. And your men are sworn in as peace officers? A. That is right.

Q. Do you have charge of the watchmen at night? A. I do.

Q. Now, some of the possessions of at least Metro-Goldwyn-Mayer in the wardrobe and costume department, for illustration, are really museum pieces, are they not?

A. That is right. They are of great intrinsic value, at least. 434

Q. Then there is the value of the libraries? A. That is right.

Q. Of a specialized character, not easily replaceable? A. Correct.

Q. This department is maintained, of course, for the protection and service of all the departments of Metro-Goldwyn-Mayer? A. That is right.

Q. Tell us what the size of the police force was in 1932? A. In 1932 I think it was around 28 men. I am not sure. That could be verified from the Accounting Department.

Q. Did you have some officers included in those 28? A. A captain and one lieutenant at that time. 435

Q. Does that include the fire department, or is it separate? A. Well, that didn't include it in 1932, Mr. Pollak.

Q. I mean 1932. A. I had nothing to do with it then.

Q. Those figures that you gave us— A. —are my police department without the watchmen. The watchmen are on an extra, what you call an extra board. They are called in only for service when they are needed, like watching on sets and taking care of very valuable properties where it would cost more money to undress the set and return it to the prop room than it would for the watchman to be

Louis B. Mayer—for Defendants—Direct.

436 assigned there until such time as the shooting schedule was over.

Q. You might give us the figures as to the fire department. A. The fire department at that time was five men.

Mr. Pollak: That is all.

(Witness excused.)

• LOUIS B. MAYER, having been first duly sworn, took the stand and testified as follows:

437 Direct examination by Mr. Pollak:

Q. Mr. Mayer, what is your present position with Metro-Goldwyn-Mayer? A. Head of the studio.

Q. And what is your title? A. Well, head of the studio. You mean legal title as such? Vice-President.

Q. Vice-President. And you are the head of this whole immense plant that we have seen here? A. Yes.

Q. And you held the same position in 1932? A. Yes, sir.

Q. What position did Mr. Thalberg hold in 1932? A. Head of production.

Q. Under you? A. Yes, sir.

438 Q. And he was, himself, a famous producer, is that right? A. Yes, sir.

Q. He died within the last few months? A. Yes.

Q. And who was Mr. Stromberg in 1932, Mr. Mayer?

A. Producer.

Q. Subordinate to Mr. Thalberg? A. Yes, sir.

Q. Mr. Thalberg was the head of all the producers?

A. Yes.

Q. And there would be a specific producer for a particular production, is that right? A. Yes, sir.

Q. Now, who was Mr. Brown in 1932? A. Clarence Brown?

Louis B. Mayer—for Defendants—Direct

Q. Yes, Clarence Brown. A. Director.

439

Q. Now, what we want particularly from you, Mr. Mayer, is a description in your own way of what the functions of a studio are in the general sense, what is it that makes the success or failure of a studio, as far as you can tell. A. Well, we have proved here that it is a question of manpower, as to who are good showmen to understand, first, to develop talent, second, to choose the right vehicle to cast the people correctly, and when you get the combination together you have a successful attraction.

Q. Now, I think I can follow you, a studio, of course, does not supply to the world a physical object that it sells, like shoes, does it? A. No. It is a creative proposition, of course.

440

Q. It creates separately a new thing every time it turns out a production. That is true, is it not? A. Yes, sir.

Q. And the question, I suppose, in every production is of somehow selecting players and a story and adapting the players to play in such a way as to make it a success, is that true? A. Yes, sir.

Q. The capacity to do that—you have called it showmanship—I think must rest on a kind of intuitive flare, is that not so? A. Yes, backed up by experience.

Q. Backed up by experience. It is a thing that some persons just have, and others do not have? A. That is right.

Q. Some people have the gift of oratory, for instance, which again depends on an understanding of people, which is entirely different? A. Yes.

441

Q. It is developed, I suppose, first, from a native gift, then by that vast experience? A. That is correct.

Q. How long has your own experience in the business been, Mr. Mayer? A. Since 1907.

Q. Since 1907? A. Yes.

Q. In other words, you have had just a quarter of a century of experience? A. Thirty years.

Q. No, in 1932 you would have just had a quarter of a century of experience? A. Yes, sir.

o *Louis B. Mayer—for Defendants—Direct.*

442 Q. And what had Mr. Thalberg's experience been in general? A. He was a producer and head of the production at Universal before he joined me when I was an independent producer, and then jointly we came over here in 1924.

Q. And am I right in this, that you and Mr. Thalberg and Mr. Rubin constituted at least as far back as 1924 an experienced team that had worked together as a group?

A. Yes. We had made pictures since—I think Mr. Driscoll would know when I got Stewart, because that is when he represented me.

Q. At least a large number of years before 1932? A. Yes.

413 Q. In association? A. Yes.

Q. Now, is there anything else you want to tell us about the general factors that make for success or failure in the operation of a studio? You say it is a matter of manpower.

A. Yes, the proper manpower.

Q. The proper manpower. A. Every studio has manpower.

Q. I am sure of that. What I mean is this, is it true that a studio succeeds or fails, well, somewhat as a law office does, or a surgeon does, depending really not on a concrete product, but on its underlying capacity of certain unreplaceable men, is that a fact, is that a fair statement?

414 A. That is correct. In 1924 when we came here we changed some of the methods of systems that had been in vogue in picture making in the large studios, for which at that time we were ridiculed a great deal, and I accepted the ridicule, but every studio since then has taken on the same system of doing it, except that they don't seem to hit the ball.

Q. Well, tell us the changes you made, Mr. Mayer, in general? A. Well, there never was any unit production. It was one man that was the head of the organization. At Paramount they had a fellow named Frank Wood, for instance. So every picture had the same flavor, and

Louis B. Mayer—for Defendants—Direct.

that was contrary to the great success of United Artists at the time because they were making a custom-made picture to fit a certain star. When they announced a Mary Pickford picture, Mary Pickford got everything that could be gotten for her in that one picture. Had she worked for Paramount, she would get the same flavor in her picture as some other girl would get, because there was only one mind to pass on it. 445

Q. I see. A. Now, then, I took from that what made Mary Pickford's success was that she was interested in making Mary Pickford pictures. So then I said, "Why not the same thing in one big organization? I can beat Mary Pickford's proposition because I could have that in 10, 12 or 14 units, 12 or 14 Mary Pickford units, and then if I did that I could back it up with a tremendous industrial organization that Mary Pickford couldn't afford in making two pictures a year, we will say." 446

Q. Yes. A. And develop a big stock company out of which you get new stars, and laboratories where you can invent new things, if you have sufficient units to make up 10 or 12.

Q. By a unit, you mean—go ahead. A. A producer under a major producer like Thalberg was, a young producer who can select the material. Thalberg would go over it with him to see whether he was right or wrong. If there was any doubt between them, I would get in on it to see what I thought of it. Although Thalberg had full authority to go ahead, nevertheless he saw fit at times where he was in doubt to adopt that procedure. Sometimes the young producer would have just as good an idea, too, and we would then get together and agree. Well, then, that young producer would make that picture differently from another producer. That is the very result now which they can't obtain in the other studios. They just can't make the grade. That is why we go right ahead, because we have been first. Thalberg was a great pro- 447

Louis B. Mayer—for Defendants—Direct.

418 ducer, probably the greatest that ever lived. We, in turn,
developed these young producers. They had the benefit of
Thalberg. Now, I was supposed to be, with all due mod-
esty, a fine producer before I had Thalberg, and I had no
one else. They were Louis B. Mayer pictures. Then I
took young Thalberg from Universal and immediately I
became more important because I added another great
brain. In fact, he was the greatest production brain de-
veloped from the time I took him because together he
developed faster, he broadened out. Now, all these young
producers got the benefit of Thalberg and myself in their
development, underlying which there was a policy and a
system of making these pictures. There was all that talk
419 of factory-made pictures which existed in 1924, and that
and the thing that made United Artists outstanding was
because their pictures weren't factory-made pictures where
everything had the same flavor. All that talk disappeared
since we put this system in:

Q. Will you explain the system of unit production?
That is perfectly familiar to you, but I would like to have
it for the record. A. I can only put it this way to you.
I will try to paraphrase it with another industry. They
asked me why I thought there ought to be a change, and
how we could get away from the factory-made system
where one man passed on all stories, and he is the one
450 that says how all pictures should be made where we were
making 50 of them a year. I said, "Let's take a custom-
made tailor. He doesn't cut one 36 suit. He doesn't cut
1,000 36's like these large clothing manufacturers. There-
fore he fits that one person where that certain fitting may
have little peculiarities that just throws it out from being
a perfect 36. Now, he has to have with him a cutter, a
cutter, a designer. He doesn't care who sews the buttons
on, or sews the linings in, providing they follow his special
plan. Now, if I set up a building in which each floor has
a young designer, a young producer, and give him certain

Louis B. Mayer—for Defendants—Direct.

writers, give him a cutter, and then back that up by a large industrial organization, so when each designer sends out a set of plans and specifications, the industrial organization must deliver it in accordance with that special plan of specifications, each man having some different kind of a creative genius to make their story a little different than the other fellow would have made it, that would be the answer to the problem." 451

The physical part of this tremendous organization could take care of them better than if that one unit was alone somewhere making two pictures a year. However, they laughed at it and scoffed at it. I don't know why they did, because it was very obvious. It was the thing that had made Fairbanks successful, and Pickford, and Chaplin successful. That is exactly where I took it from. If I was successful all alone in making four pictures a year, and they said, "Louis Mayer was great, Tom Ince was great, and Joe Schenck was great making four pictures a year when Pickford was supreme, and Chaplin was supreme," it was very obvious for me that I could do it with these large plants. I could do the very same custom picture making by putting on each floor a set of different designers and creators, and then back it up by a tremendous industrial proposition and a large stock company, because we would need so many actors to take care of so many units that we could afford to take young talent, discover an unusual person, and therefore make stars. We have made them all, practically all, with very rare exceptions. We made stars out of raw talent. We scout the world for talent and bring them here and develop them. Do you understand that? I know Driscoll would. He knows the business. 452 453

Mr. Driscoll: I understand it perfectly, Mr. Mayer.

Louis B. Mayer—for Defendants—Direct.

454 By Mr. Pollak:

Q. Would you tell us, for example, what you did in the case of Miss Crawford? A. Well, when we took her she got very little money when we first got her, but she was an intensive, ambitious girl. I was going to say she slept here, or the next thing to it. Nothing meant anything to her.

Q. This was about when, Mr. Mayer? A. 1924, I think, or '25. Either late in '24, or early in '25.

Q. Yes.. A. She developed her body beautifully, and she was very ambitious. She would play any little part they could give her, and the directors liked her very much
455 because of her great ambition and desire to work. We developed her like we did Shearer or Gable, or any of those people.

Q. She came as a rather obscure person, is that right? A. Yes. She got \$75.00 a week when we first took her, and we have been changing her contract ever since.

Q. Would you tell us something about Mr. Montgomery, your experience in connection with him? A. Montgomery had been in a picture for Mr. Goldwyn. That was his picture experience. He took him out as a failure, and he went into a play again on Broadway with Selwyn, Edgar Selwyn, who is a brother-in-law of Mr. Nicholas Schenck, President of our company. The play was a failure. It
456 didn't last long. This boy wanted to get back into the movies, and through Edgar Selwyn's connections he introduced him to Nicholas Schenck, who liked him. He was charming and entertained him, and he got us to see if we wouldn't be interested in trying this fellow out because he looked so good to him, and we did. We brought him out here and we all got kind of excited about him, and he has mounted until here the other day we gave him a tremendous contract again. We tore up the old one and gave him another one.

Louis B. Mayer—for Defendants—Direct.

Q. What was the position of Miss Crawford in 1932, 457
was she then a distinguished actress? A. Oh, yes. She
was one of the top-notchers. She was at the height of her
career around 1930.

Q. And thereafter, including '32? A. Well, she is tre-
mendous now, bigger than she was then.

Q. But she was one of the leading actresses? A. One of
the leading stars in the business.

Q. And was Mr. Montgomery one of the leading stars
in 1932? A. In the men, yes.

Q. Among the men? A. Yes. He wasn't the top, but
among them, among the first seven or eight.

Q. And Miss Crawford, if you wanted to put a numeri-
cal valuation on her, it would be among the first what 458
number? A. The first four.

Q. In 1932? A. Yes.

Q. In the whole country? A. Yes.

Mr. Driscoll: And that means the world?

The Witness: I wouldn't say the world. There
is a distinction there, because, take Garbo, who is
in Europe tremendous, here not as strong as Craw-
ford. Crawford isn't as strong in Europe as Garbo.
That varies. Dressler was tremendous in America,
not in Europe. They didn't understand her.

By Mr. Pollak:

459

Q. Is this true, Mr. Mayer, that the gift of a great man-
agement consists very largely in finding an actor or actress
that at the given moment hasn't attained greatness and
may have specific defects, but in whom you can see the
germ of greatness with proper treatment? A. That is it.

Q. Perhaps my sentence is not good. Did you get my
sentence? A. Yes, I think I understood you.

Q. Go ahead. A. We took this boy Taylor, for example.
This company wouldn't take, I don't think, a million or a

Louis B. Mayer—for Defendants—Direct.

160 million and a half for his contract. He was getting \$35.00 a week. He had never acted. He went into amateur theatricals at Pomona College and we developed him. We fixed his hair. We plucked his eyebrows and taught him to dress properly, and taught him to speak lines, and gradually built him up. We will be busy changing contracts with that fellow. If they don't succeed we are in trouble. If they do succeed we keep changing contracts.

Mr. Driscoll: That is like baseball players, and everybody else. They hold out when they are good, don't they?

461 The Witness: Yes, sure. We beat them to it now, Driscoll. We increase them and change them before they get a chance to get lawyers in and have a fight.

By Mr. Pollak:

Q. Well, Mr. Mayer, a serious part of a successful management consists in picking actors that have not yet attained fame, in whom you can see the capacity for future development? A. Well, we have done it in two days. We have had those that are raw material, absolutely raw, and never have acted. Then we have taken the ones that have been a failure with the other studios, who have gone downhill. William Powell was one. He was finished. He is at the top today, one of the top-notchers. He became so in two or three pictures here. We took Wallace Beery from Paramount after they got through with him and we built him back, but we have to have the feeling that they have mishandled him, and we do something to bring him back. Then we change the characterization of a person. You take Jean Harlow who was nothing, and by making her into a comedienne instead of a melodramatic, serious person—they played her as a gunman's moll. With "Redheaded Woman" we turned her into a big star with

462

Louis B. Mayer—for Defendants.—Direct.

one picture, just by the proper casting. We reversed the casting. 463

Q. Do you sometimes find that an actor or actress, for whatever reason, isn't a success and you have to find a substitute? A. Oh, yes. One of the greatest in America failed in pictures, and she knew why, and I know why. God wasn't kind to her. She wasn't good-looking.

Q. Well, what I mean is this: Sometimes after you have started production you have to put in a new actress? A. Oh, yes. Often we take a fine star out of a picture. Myrna Loy couldn't understand the characterization of "Escapade", and we put Rainer in, which was quite an undertaking because Myrna Loy was very big with Powell, they are a great team together, but I had to do it and take my chances. I thought that was the best judgment to use. That made Rainer. 464

Q. She had not been famous before that? A. No. She hadn't played anything. We brought her over from Europe. One of our scouts found her, and the lawyers are giving us trouble with her right now because she is successful.

Q. Well, now, I suppose quite as important as actors and actresses even is the selection of producers, is that right? A. Well, I think it starts there first.

Q. It starts there. Will you tell us about that, unless you wanted to say something more about this other phase. A. What phase? 465

Q. About the selection and the development of actors and actresses. A. Well, if you have a great producer you are going to have great pictures, and you are going to have stars. If you haven't great producers and only have stars, you will have no stars tomorrow.

Q. Why is that, Mr. Mayer? A. Because they miscast them. They have no understanding. Why did they kill Powell? Mary Pickford wouldn't have lasted as long as she lasted if she stayed in that factory over there. There was no one there to handle her. It is very obvious what would happen.

Louis B. Mayer—for Defendants—Direct.

466 Q. Then the producer— A. —that is the great first No. 1, a big No. 1.

Q. Well, now, will you tell us about that, if you will? A. Well, if he is a great showman and is really inspired, what he will do first, he will find an idea, or a play, or a book. Our great successes have been in the original stories developed here. The next thing he does is develop talent, because without personalities great pictures, with rare exceptions, go right down through the floor.

Q. Without attractive stars? A. You bet.

467 Q. I see. A. With some pictures we have made here, without those stars we wouldn't dare to attempt it. We wouldn't even make such a picture in Class B. The moment you put those stars in you have a different proposition.

Q. Now, go ahead and tell us more about the producer, and what he does. A. Well, he gets his idea, the story material, and then he has to find a personality, without which he is licked. Then he selects the proper director. Then he watches his rushes, each day's films that they took the day before to see whether the director is keeping up the tempo and the spirit and the suspense that the story and the script call for. Often they will get away from it, they will get too slow or too fast. He really is behind the director constantly all through the picture until it is finished. Then the editing becomes a very important matter in which the producer is supreme. Regardless of what the director wants, unless the producer sees it that way, it is the producer's last word, last verdict.

468 Q. It is the producer that determines what is to be done in the picture? A. Right straight through, completely.

Q. The director is the executive man who does it, in a sense? A. He is the man that directs the picture on the sets, and each day is told by the producer whether he is satisfied with what he did the day before. If he is not

Louis B. Mayer—for Defendants—Direct.

satisfied, they have a talk and discussion, and the producer shows him the film, and the director goes back the next day, or some time, and re-does it in order to keep up with the idea that the producer had when he developed this story. 469

Q. Now, the particular producer of this picture under Mr. Thalberg was, as I understand, Mr. Stromberg? A. Stromberg, I think, as I remember it.

Q. What was his standing, in your judgment, as a producer? A. Well, he had made some of our best pictures, next to Thalberg. Thalberg made the best pictures, then Stromberg.

Q. In other words, Stromberg stood very high himself? A. Yes, and today the best there is. 470

Q. Let me get this straight. The management assigns a given producer to a given production, is that right? A. No. What we do first is, we have story meetings, and ideas spring up for original stories. Then I have a committee to pass on it with me. If it is already created material, whether it is a book, or a play, or a historical subject, it is discussed. If I see it, I agree either to the development of the original idea, or the buying of a certain property. Usually there is something wrong with it for pictures, with rare exceptions. We try to see the goodness in them and then we go and rebuild the rest of it.

Q. No story is accepted for production without the sanction of the executive management? A. No. 471

Q. None without your sanction? A. Then I have to sell it to the producer.

Q. I see. A. If this producer doesn't like it, I try another one that I think would have a feel for that kind of a story, for that kind of an idea.

Q. You adapt the individual producer? A. You have to.

Q. To the individual production? A. Oh, you have to.

Q. And the same with the director, Mr. Mayer? A. Well, then the producer, in turn, discusses with me now—it used

Louis B. Mayer—for Defendants—Direct.

472 to be with Thalberg—which director in our judgment ought to direct that particular story, because he has to be cast properly or you are in trouble. Very often we have to take them off, the director just can't seem to understand it.

Q. I see. A. And we have to substitute another director. Then you are in terrible trouble because then he doesn't like what the other fellow had done, and he tries to change all that, and eventually you have to remake the whole thing.

Q. The executive management chooses every producer, of course? A. Every producer.

Q. And assigns every producer to each production? A. Right.

473 Q. And in the same way, chooses the director? The producer does that, doesn't he? A. That is done in conjunction with the producer.

Q. But the original selection of a director would never be made without your approval? A. Oh, no.

Q. And the signing of his contract is always dependent on your approval, isn't that so? A. On every person.

Q. Including all producers and all directors? A. In fact, on all the talent and the creative side, I pass on all of them.

Q. And this was substantially true in 1932? A. Well, either Thalberg or myself.

474 Q. Either Thalberg or you? A. And even then Thalberg would get my approval.

Q. And that goes for all the stars, too? A. Everybody.

Q. Everybody. A. On the creative and the artistic side.

Q. Then the determination entirely of what producer to have, what director to have with what producer, and what stars to use, all of that is for the executive management?

A. It comes into my hands now. It used to be Thalberg and I.

Q. Those are the things that are essentially determinative of the quality of a studio's production, isn't that so?

A. Why, of course. That is all there is to it.

Louis B. Mayer—for Defendants—Direct.

Q. What do you have to do, the executive management, with the Art Department, as an illustration, Mr. Mayer? 475

A. Well, I select the head and he, in turn, picks his assistants, subject to the approval of the General Manager, and the Studio Manager, and Production Manager.

Q. Now, the major problems, I suppose, of the several departments might come to the executive management, might they not? A. The major problems of what?

Q. Well, of the separate departments. For instance, if Mr. Nickolaus wants to conduct a series of elaborate experiments he would take that up with you, might he? A. No, take it up with the General Manager, Mannix, who, in turn, would take it up with me. 476

Q. He would take it up with the executive management? A. That is right.

Q. Will you tell us something about the creation of the laboratory here, Mr. Mayer, Mr. Nickolaus' laboratory?

A. We used to give out our film to develop and print in the commercial laboratory. I had fought with Thalberg for years to try to get the best photography that was humanly possible to get to enhance the beauty of the women that we engage, because they are supposed to be beautiful. Well, then, you spend a lot of money, and with your money, which goes very rapidly, it takes time to properly light a personality. Then we give the film to the commercial laboratory, and because they gave us a low price on the film they would ruin all the beauty of what was in the negative. That was perfectly human, they wanted to make a profit, and the faster they could turn this thing out the more profit they would make. I tried to sell our people on building our own laboratory, not to make any money on it. I brought Mr. Zukor over at that time, who was a veteran, a dean, to show Mr. Schenck and get him to agree with me that were still selling photography, that was our business. The moving picture is a series of photographs, and the more attractive the photo- 477

Louis B. Mayer—for Defendants—Direct.

478 graphs were, the finer merchandise you had for the public to sell, and by all means to have our own laboratory. That was the start of that. I think we have as good—we always say the best—but at least as good as there is so far in the world that I have ever seen. We stopped at nothing to get that perfection in the laboratory. Then we angled to get this fellow Nickolaus, who has been here ever since we built that plant. Before that we had a small plant just for dailies, and I had the same important man to do that. That was the importance I placed on having a beautiful negative, and then I would get high blood pressure when I would see the prints come out from this commercial laboratory. But instead of losing money on it, this laboratory has made money on the price that we would pay a commercial laboratory, and we get every bit of the value that is humanly possible to get out of that negative that went on it.

479 Q. How about the sound work? Did you select Mr. Shearer, or you and Mr. Thalberg? A. No. It was Mr. Mannix and Mr. Thalberg that selected him and sold me the idea that he would be the fellow.

Q. Well, you approved? A. Oh, yes.

Q. It was taken up with you? A. With every head of a department so far I have either had the selection or the approval of.

180 Mr. Driscoll: Shearer was here before sound, as a matter of fact?

The Witness: Yes, he came to me before there was any talking pictures and gave me the theory that he could make pictures talk, and I couldn't understand what he was talking about. It is Greek to me. I don't know much about it now, except that if the picture isn't right in sound I have raised so much hell about sound for the last six years since it has been in that now we get yearly the award for

Louis B. Mayer—for Defendants—Direct.

the best sound, and I wouldn't stop until I got there. I gave them no peace and kept shifting and changing until today I think we have the best sound in the world, and the proof is that we keep getting the award each year. 481

Q. You mean from the Academy? A. Yes, and we have tough competition, as far as sound goes. We have no competition otherwise. Since United Artists, Pickford and Chaplin have gone we have no competition at all.

Q. United Artists was a concern in which several prominent motion picture actors joined and made individual productions? A. Pickford made hers, Fairbanks made his, Chaplin made his, and they did beautiful work because each one was custom-made to fit that personality, and nothing was left undone to make that picture attractive. That inspired me when I thought about how to make a big studio do the same thing and get the benefit of a huge organization. You see, Pickford had one disadvantage. She couldn't have a stock company of 100 players from which to pick and have scouts all over the world to get a Gable or a Taylor or a Crawford or a Shearer. And so, as the clock went on and Miss Pickford was getting older, she was getting right to the edge where she couldn't go on any further, while as ours will get older we have young ones coming up constantly to replace them, while the others go into character roles. Now, you see, our stars have lasted ever since I am here. Crawford, I think, came in '24 or '25. Shearer came before that. I had her on Mission Road when I was alone. She has been with me for 14 years. Garbo I brought over from Berlin some time in the latter part of '24 or early in '25. She has been here ever since. She is on the top of the heap now. No other studio has ever been able to accomplish that except Pickford, Chaplin and Fairbanks because they used the system that inspired me to use the same system. 482 483

Louis B. Mayer—for Defendants—Direct.

484 Q. You created outside of that studio this until production studio? A. That was the first time it happened in '24 when I took it on.

Q. And in that studio each artist was his own producer, really, is that it? A. Yes.

Q. Now, Mr. Mayer, tell us in a general way what Mr. Schenck does, Nicholas Schenck, that is? A. Well, he is the whole boss of the whole works, and he comes out here. His big problem is to confer with us where I don't want to take the responsibility of an important change of policy. He comes out about three or four times a year. I used to go back east very often when Thalberg was here so I could leave the studio, and I do the conferring with him on policy.

485 Q. He is the President? A. He is the President.

Q. You are in charge of actual physical production? A. I am in charge of the studio completely, and he has all three branches under him.

Q. By the three, you mean— A. Distribution, exhibition and producing, and while he doesn't interfere with our operation here, I want the benefit of his brains and judgment. It has been a great help because he is a great showman, I think he is the greatest chief executive that has been in the business.

486 Q. And would you tell us who Mr. Mannix is? A. He is the General Manager I brought here. He used to produce pictures for Joe Schenck, Norma Talmadge and Constance Talmadge pictures 20 years ago, and I took him from them, and he has been General Manager. He was assistant to me, assistant to Thalberg. He came right up in the work.

Q. And in 1932 he was what? A. I think he was—yes, he was assisting Mr. Thalberg.

Q. I see. A. Because Thalberg produced his own and took care of the other producers on top of that. He had to have help.

Q. That is, Thalberg would sometimes act directly on the productions? A. Oh, yes, he made pictures.

Louis B. Mayer—for Defendants—Direct.

Q. And also supervised? A. Yes, all the scripts came rough him. 487

Q. By the way, does the executive management bother with shorts? A. Well, we had a man. We had a department for that. Mr. Rapf was taking care of that. Mr. Mannix, as General Manager, had a good deal to say to him, and the head of the Shorts Sales would come out here and would order what he thought he needed for his program.

Q. But you and Mr. Thalberg, I suppose, would not bother with it? A. Very little with the shorts. If there was a change of the head, why, we would have to get someone to do that, but once they got started, unless there was trouble, we didn't bother with it. 488

Q. Mr. Mayer, generally speaking, which would be the more important factor in the success of a given picture, the original story or—Mr. Schwartz corrects me—the literary material or the production given by the producer, including the whole works?

Mr. Driscoll: I submit, Mr. Special Master, that question is not before the Special Master. The decision of the Circuit Court of Appeals here stands on this proposition, and we can't change it now. It is just wasting time to go into any such proposition.

Special Master Auchincloss: I think you have gone far enough, Mr. Pollak. You have brought out the facts— 489

Mr. Pollak: Mr. Master, I want to show definitely what the maximum contribution of the written material to the profit was, what, at the outside, would be the profits derived because of the infringement. I may say that I am relying particularly in this very proof on the authority of two cases in the Supreme Court of the United States, the Westinghouse case, 225 U. S., the Dowagiac case, 235 U. S.

MICRO CARD

TRADE

MARK



22

39



65

410



Colloquy of Counsel.

both patent cases involving admittedly similar issues; in which the court with great care said that in cases where both the plaintiff and the defendant had made some contributions to the ultimate result, that the defendant could show exactly, if it could, what proportion of the contribution was its own, and if it couldn't show it exactly, could show at least with approximation what proportion was its own. I think the evidence is, in the highest degree, material and relevant. I further submit, if your Honor please, that in any event, it is the function of a Master to take the evidence so the evidence can be before the District Court and the Circuit Court of Appeals and, if need be, the Supreme Court if, in the view of any one of those courts, the evidence is material. I think the question should certainly be answered.

Special Master Auchincloss: I should think it would be opinion evidence, anyway.

Mr. Pollak: It is opinion evidence.

Special Master Auchincloss: Of course, Mr. Mayer is an expert, I suppose.

Mr. Pollak: We have carefully qualified him.

Special Master Auchincloss: I haven't read either of those cases, and I am inclined to let the testimony go in, with the right to strike it out later on.

Mr. Driscoll: I want to get my objection on the record.

Special Master Auchincloss: Yes.

Mr. Driscoll: Because there is but one question referred to the Special Master, and that is the question of the accounting, dollars and cents, and this particular thing that Mr. Pollak wants to bring into this proceeding now is not before the Special Master, and the Special Master has no authority to make a finding on it. And if he hasn't any

Louis B. Mayer—for Defendants—Direct.

authority to make a finding on it, then the evidence is absolutely lost, it doesn't belong in the situation at all. Now, I object to it as incompetent, irrelevant and immaterial and not within the issues that have been referred to the Special Master to decide. 493

Special Master Auchincloss: The objection is overruled, and the testimony will be taken.

Mr. Driscoll: Exception.

By Mr. Pollak:

Q. Will you read the question?

(The question was read by the Reporter.) 494

The Witness: Well, it is rather difficult to give it so you can understand what I want to get at.

Q. Answer it in your own way, and give your own opinion in your own way. A. To me it has proven over the long stretch of time that the star, if you have any, makes the difference between failure and success. Occasionally there is a tremendous, well known, powerful story that has been a tremendous success on Broadway, or a book that has sold a tremendous number of copies, like "Gone With The Wind" right now, which has a terrific value, a chance at least to put your money in without stars and hope to get away with it. Now, if you have stars in there and the property is well known and as popular as that, and if you do a good job and make a good picture, then you have the maximum out of it. We have made stories here, original ideas. If we didn't have stars we wouldn't dare to put them out, and yet we take in a tremendous gross on them. There was one little picture here recently, "His Brother's Wife", that went over because Bob Taylor was in it. As a small picture we wouldn't dare to make it. I think it has done a million domestic already. 495

Louis B. Mayer—for Defendants—Direct.

496 Q. In your opinion, Mr. Mayer, in the case of a profitable picture, if that distinguished picture has distinguished stars appearing in it, what proportion of the success would you think would normally be ascribable to the stars?

Mr. Driscoll: I object to it as incompetent, irrelevant and immaterial, and not within the issues that have been referred to the Special Master to hear and report.

Special Master Auchincloss: The testimony will be taken over the objection, with an exception.

Mr. Pollak: Do you want the question read?

497 The Witness: I know what you are talking about. I understand it. We have so many different cases—you mean what percentage?

By Mr. Pollak:

Q. Yes. A. Well, I can show you pictures that would apply 100 per cent. It seems incredible because we wouldn't dare attempt to produce the material if we didn't have the stars. I will name them to you: "Libeled Lady" is one. "Forsaking All Others" is another. "His Brother's Wife" is another. "Personal Property" is another. We wouldn't dare touch them except for those stars, what they do to it. Well, now, in that case, I don't know, it sounds silly to say 100 per cent., but it is as close to that as you have the courage to say it.

498

Q. Well, taking a conservative estimate applicable throughout the general field of picture production, what proportion would you say would be ascribable to the drawing power of the stars, as compared with the written material?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues that have

Louis B. Mayer—for Defendants—Direct.

been referred to the Special Master to hear and report. 499

Special Master Auchincloss: The testimony will be taken with an exception.

Mr. Driscoll: Exception.

The Witness: Would you mind repeating that?

Mr. Pollak: Read the question.

(The question was read by the Reporter.)

The Witness: Well, the star has been the whole thing from the beginning of this industry, and at least 75 per cent. I would say to me it is the whole thing, if you have a real star.

By Mr. Pollak:

500

Q. Well, Miss Crawford was a real star in 1932? A. One of the biggest we had.

Q. Am I right in this, Mr. Mayer, that the proportion ascribable to the stars is obviously greater if the stars are greater? A. Why, of course. That is the whole history of motion pictures. That is why the other studios say, "How can you beat them? They take ordinary material and put those stars in and it becomes great material the moment those stars get in, and we haven't got the stars". Well, if they did have them they would kill them anyway, they wouldn't know what to do with them.

501

Q. Mr. Mayer, am I right in this, that the proportion ascribable to the literary material is less if the literary material bears no well known name? A. Why, of course, obviously.

Q. Take the case of a play which has first appeared as a play, but its name is not used in the picture. Does that tend to increase or diminish the portion ascribable to the literary material?

Mr. Driscoll: Object to that as immaterial, incompetent and irrelevant, not within any of the is-

Louis B. Mayer—for Defendants—Direct.

sues that have been referred to the Special Master to hear and report.

Special Master Auchincloss: Same ruling and exception.

Mr. Driscoll: Exception.

By Mr. Pollak:

Q. Have you got the question? A. Obviously, if the play has been a big hit, terribly advertised and magazines have written about it; when you lose the title you have lost what you pay for, a part of it, a good part. We have bought stories because the title became famous. We have just now bought a book where we are not going to use one word of it, but the title was so highly advertised all over the nation that that is what we bought. That was "The Great Waltz". We are not going to use a line of it.

Q. In the case, Mr. Mayer, where the title of the play does not appear as the title of the picture, and where the play has not been a conspicuous success when produced on the stage, what would you say in such a case would be a fair proportion to ascribe to the drawing power of the stars as a minimum?

Mr. Driscoll: That is objected to as incompetent, irrelevant and immaterial, not within the issues that have been referred to the Special Master to hear and report, based solely upon a hypothetical case and having nothing whatever to do with any issue that is now being tried out, or has been tried out, heretofore in this action.

Special Master Auchincloss: The same ruling, with the exception.

The Witness: Well, it would be entirely the star in the kind of picture you made because the material isn't known to the public so they couldn't be going for the material.

Louis B. Mayer—for Defendants—Direct.

By Mr. Pollak:

505

Q. In other words, the share ascribable to the stars increase with the importance of the stars? A. Indeed.

Mr. Driscoll: Objected to as incompetent and irrelevant and immaterial.

Mr. Pollak: I will stipulate that your objection goes to the whole line of testimony and need not be repeated.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial and not within the issues that have been referred to the Special Master to determine here; and on the further ground that it is leading.

506

Mr. Pollak: I can cure the leading if you really press that.

Mr. Driscoll: I am going to press it, yes.

Mr. Pollak: All right, I will recast the question, Mr. Master.

Q. Mr. Mayer, there is one particular thing that has been testified you are a little proud of and, as the head of the studio, I would like to ask you about that. You have told us, I think, about your care in production. Does that include a regular technique of retakes if the production, when it is first started, is not successful? A. We practically were the originators of it here. They used to call this "Mayer's Garden of Retakes", or "Mayer's Valley of Retakes". Those were the caricatures made of me when I first started that system in '24.

507

Q. And the point of the retakes is, of course, to— A. —to perfect what is imperfect, to enhance the entertainment value, because I don't think any man knows at the time he is doing it whether he has it licked or not.

Q. Do the previews fit into that system of retakes? A. That is what we have the previews for. We have the

Louis B. Mayer—for Defendants—Direct.

508

writers, directors and producers all go to look it over and then sit down the next morning and pass on the picture.

Q. And you also have actual tests of the reactions of audiences? A. Yes. We give them cards when they go out and we get them back the next day through the mail as to what they thought about this, that and the other part of the picture, their own criticism.

Q. There is another personality I would like to have you tell us about. Who was Mr. Adrian? A. He is the head of the wardrobe. He is the chief designer.

Q. And was he chief designer in 1932? A. I believe so.

509

Q. What is his position, in your opinion, as a designer? A. I think he is one of the best in the world. Prior to him I brought a man over from Paris called Erte. He was an international figure.

Q. I don't think he was concerned in this. I would like to ask you this, Mr. Mayer, you have given your opinion as to the drawing power of stars. Is there also a certain drawing power in the fact of production by a distinguished producer in your opinion?

Mr. Driscoll: I am making the same objection to that question, as irrelevant, incompetent and immaterial and not within the issues that have been referred to the Special Master for hearing and report.

510

Special Master Auchincloss: Same ruling and exception.

The Witness: Well, of course, the finer the producer is, the finer the result is, tremendously so.

By Mr. Pollak:

Q. Is there, in your opinion, a drawing power in actual box office receipts ascribable to the reputation of the Metro-Goldwyn-Mayer Studios? A. I think that is the accepted fact.

Mr. Driscoll: Same objection and exception.

Louis B. Mayer—for Defendants—Re-direct.

By Mr. Pollak:

511

Q. What was that true in 1932? A. Yes.

Special Master Auchincloss: Same ruling.

Mr. Pollak: You may cross examine, Mr. Driscoll.

Cross examination by Mr. Driscoll:

Q. Mr. Mayer, it is a fact, isn't it, that a number of stars have been ruined by bad material? A. Well, not entirely bad material; bad development and bad direction.

Q. Well, isn't it a fact that a story can be so bad that it will ruin any star, any star? A. Well, of course, obviously you can't make a picture with bad material. 512

Mr. Driscoll: That is all.

Re-direct examination by Mr. Pollak:

Q. Mr. Mayer, I think there is one further question. Am I right in this, that the compensation that was paid you in whatever form, in connection with your services to Metro-Goldwyn-Mayer included not only executive management, but your specific experience and contribution as a producer? A. Well, that was when I came over here. 513

Q. Well, you were continually thereafter reimbursed for both services? A. Yes.

Q. As far as you can differentiate them, as executive and as producer, is that right? A. Yes.

Q. Did the same thing go for Mr. Thalberg? A. Well, he was practically entirely a producer and head of the production, but myself, for instance, I went over and did "Ben Hur" in Europe. I was a producer at that time. Then I brought it back here and Thalberg finished the part we made in America.

526

Q. Did it exist in 1932? A. No.

Q. I will withdraw the question. What is Studio News? Did that exist in '32? A. That is right.

Q. Tell us about that. A. Studio News is a publication that we put out with every important picture. We put it out about three weeks in advance of the picture. That goes also to every Metro-Goldwyn-Mayer account and to trade papers and newspapers all over the United States.

Q. Do all these things go out free? A. Yes.

Q. And, for instance, did you regard "Letty Lynton" as an important picture? A. A very important picture at that time.

Q. Which was included in Studio News? A. That is right.

527

Q. Now, tell us about the photo service. Well, on each picture we have a man assigned that makes still photographs. In addition, we have three portrait photographers. We have three publicity photographers, and their job is to get enough photographs to supply all the types of publications. They are all classified. There is a certain kind of photograph for newspapers, a certain type for magazines, a certain type for other publications, and those are mailed out regularly to those papers and magazines.

Q. Let me ask you this, is your photo service in sheer extent more complicated than that of any other studio? A. Yes, it is.

528

Q. And was in 1932? A. Yes, sir.

Q. Now, tell us about exclusive mailings. A. Well, for instance, if you have four newspapers in the city, for instance, in Los Angeles you have the Examiner, the Times, the Herald and the News. Well, if a picture is going out like "Letty Lynton," we can't send every paper the same story, you know, and so we have it arranged so that we send one story to the Examiner, another kind of story to the Times, and another kind of story to the Herald.

Q. But you will try to cover each with a story? A. We do cover each with a story.

Howard Strickling—for Defendants—Direct.

Q. And that applied in 1932? A. That is right.

529

Q. That is sent to numerous editors in different cities of the land? A. That is right.

Q. Tell us about spot news. A. The spot news is the news that goes over the wire services and is used by columnists. For instance, if Norma Shearer decided to come back to work right now it would be a big news story. That is spot news.

Q. Did that exist in '32? A. It did.

Q. And covered about how many theatre operators? A. Well, the spot news covers the newspapers. I mean where you include the press service and everything. It includes hundreds of thousands of newspapers.

Q. Well, it is mentioned here as including a postal card system. A. Oh, I'm sorry. We call that the postcard news. The postcard news is a postal card which we send out every 10 days which goes to all the Metro-Goldwyn-Mayer accounts, all theatre managers, which advises them in brief form of castings, new pictures we are starting, what is going on at the studio, what condition the pictures are in, and so forth.

530

Q. Especially concentrating, of course, on features? A. That is right.

Q. Now, do you have a system whereby editors are made free of the studio? A. Yes, sir.

Q. Tell us about that. A. Well, that is divided. There is plant and production. Their job is to transmit material that is produced, and when they get a story, to plant it in the paper. In 1932, as of now, we have on an average of about 150 out-of-town motion picture editors who come here.

531

Q. This was in 1932? A. That is right.

Mr. Schwartz: You take them through the studio?

The Witness: We take them through the studio and take them to dinner, and have them interview the stars.

Louis B. Mayer—for Defendants—Re-direct.

514 Q. And Mr. Rubin, himself, had experience of production? A. Not much.

Q. Well, with production? A. He represented the studio and did everything we wanted and, by virtue of that, of course, he got certain experience of value in the kind of material wanted, the people wanted, and doing it up for us. If we wanted certain people, he discovered those people and brought them over.

Q. He did not confine himself to purely legal work? A. Oh, no. He is the business head of the studios in New York and in Europe.

Q. And in Europe? A. Yes.

515 Q. And that was substantially true in 1932? A. Yes.

Q. That is, he was a very important executive in 1932? A. Yes, sir.

Q. And Mr. Thalberg was an executive at least to the extent of supervising the other producers? A. All production was under Thalberg, and when there was any doubt he came back to me about it.

Q. Mr. Mayer, am I right in this, that the system of building up a reserve of stars on a long-time contract is, in your opinion, more economic than the system of hiring stars for particular pictures? A. Yes, because the price becomes fabulous after they are made.

516 Q. Had Miss Crawford, if you know, had successful productions before 1932? A. Yes.

Q. Regardless of material? A. Yes, sir.

Q. And for a period after 1932? A. Yes, sir.

Q. That is, the Crawford productions, whatever they were, were great successes? A. Oh, sure. Look at the figures and you can see it.

Mr. Pollak: All right. That is all.
(Witness excused.)

Howard Strickling—for Defendants—Direct.

(At the hour of 4:30 o'clock p. m., the hearing 517
was resumed.)

HOWARD STRICKLING, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. State your name, please. A. Howard Strickling.

Q. What is your position? A. Director of Publicity.

Q. And did you hold that position in 1932? A. I was not in charge. I was assistant at that time.

Q. I see. Now, we haven't very much time. We are going to ask you to exercise one of the greatest arts, either 518
of writing or speaking, which is condensation, and I am the last fellow to ask for it, but will you tell me in general terms and quickly what the nature of the Publicity Department function was in 1932? A. Here at the studio, the basis of the Publicity Department is the fact that we are selling personalities. I mean from the time a person comes under contract we start in and develop that person's personality. That is our first job. Secondly, our job is to sell motion pictures. So, from the time a picture starts we start selling that motion picture through the medium of magazines, newspapers, syndicates, and everything else.

Q. And who do you exploit personalities? A. Well, for instance, in the case of Joan Crawford, when she came here 519
her name was Lucille La Soeur. She had been a chorus girl at the Hippodrome Theatre in New York. The first thing we did was to change her name. We had a contest in the movie magazines for a name, and we selected Joan Crawford as a name for her. Then we took a lot of photographs of her and publicized her. Then as she came along and played her first part, they decided that she had personality and had possibilities. Then we took her over and we tried to develop a personality for her. At that time it was in the whoopie days of the flapper age, so she was

Howard Strickling—for Defendants—Direct.

520 the flappers' delight, you know; so we publicized her as that. She was the shopgirls' delight? That was the slogan they used for her. She played in such pictures as "Modern Daughters", "Dancing Maidens", and all those things. Then as she came along, in time, she played more serious parts, and we changed her publicity so as to match what she did.

Q. And what did you do with this publicity, how did you get it over to the public? A. Through newspapers, magazines and syndicates. Here in Los Angeles are 380 people who make their living by writing about motion pictures. They represent all the news syndicates from all over the world, all the magazines from all over the world.

521. Q. And that was substantially the same, perhaps with different figures, in 1932? A. Yes.

Q. You are trying to throw your mind back to '32 now? A. That is right.

Q. Go ahead. A. Well I mean that is all there is to it. As I say, we publicize and sell personalities, and we sell motion pictures to the public. That is our job.

Q. Now, how do you get in touch with these 380 persons, or whatever the number is? A. We have a department of about 50 men and women here at the studio and it is divided up. One man handles syndicates. One man handles fan mail. One man handles fan magazines. One man handles national magazines. One handles the foreign press, and so on down the line.

522 Q. And do you give syndicated material to these publications? A. We do.

Q. And do they then either publish it as is, or rewrite it, whatever they like? A. In most instances they publish it more or less as is.

Q. Well, do the great majority of them publish it in some form or another? A. That is right.

Q. Now, tell us about these fan magazines, what are they? A. There are about 16 fan magazines ranking from the

Howard Strickling—for Defendants—Direct.

top one, which is called "Modern Screen", and the second one is "Photoplay Magazine"—the top one has a circulation of around 750,000. 523

Q. They are interested essentially in the personalities of the screen? A. That is right.

Q. Now, let me ask you a few questions. Maybe I can make it quite speedy. Tell me what the weekly feature service is? A. The weekly feature service; we send out to about 800 newspapers throughout the United States each week a letter of the news happenings of the week, fashion pictures of our stars, beauty hints that our stars use, featured interviews, or anything else. We time that to tie up with the current picture. For instance, we are doing "Letty Lynton". Near the time of the release of "Letty Lynton" we try and flood and supply newspapers with material on that picture so as to sell an individual picture. 524

Q. Would that include not only the women but, for instance, the men—in this instance Montgomery? A. Surely. It would include Montgomery, Clarence Brown, the director, and it would include the supporting players.

Q. What is Hollywood Today? A. Hollywood Today is a weekly bulletin we get out which goes to every Metro-Goldwyn-Mayer account in the world. We put out about 20,000 copies of it.

Q. By account, you mean theatres? A. Every theatre that buys Metro-Goldwyn-Mayer products. 525

Q. And what does it look like? A. It advises the theatre managers and theatre publicity men of what is going on at Metro-Goldwyn-Mayer. That is also timed so as to sell pictures. That supplies the theatre manager with material which he, in turn, can use in his house organ, his newspaper, and so on.

¹ Q. What does it publicize, the stars? A. It publicizes the stars and the picture.

Q. And also the director, for instance? A. That is right.

Q. Now, how about Hollywood On The Air, what is that? A. Hollywood On The Air is a radio program.

Howard Strickling—for Defendants—Direct.

532 By Mr. Pollak:

Q. And what is the effect of this inspection by out-of-town editors? A. It has been of great benefit to our individual pictures.

Q. How large was your organization in '32, the Publicity Department? A. About 70 people.

Q. Now, a great emphasis was and is placed on the personality of the stars? A. That is right.

Q. Is that predicated on a belief on your part that it is star appeal that chiefly carries a picture?

533

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues that have been referred to the Special Master.

Special Master Auchincloss: Same ruling.

Mr. Pollak: You may answer.

The Witness: What was the question?

(The question was read by the Reporter.)

The Witness: That has been a Metro-Goldwyn-Mayer policy. Metro-Goldwyn-Mayer believes in personalities. They develop personalities and sell personalities. That is why they have the largest Publicity Department, and probably spend more money than any other company publicizing and exploiting our people in pictures.

534

By Mr. Pollak:

Q. Well, is your publicity effort especially concentrated upon personalities? A. No. We sell personalities and we sell pictures.

Q. Yes, I know, but in developing news, is it your belief that the appeal of the picture is primarily predicated upon the personalities of stars, for instance? A. That is right, it is.

Q. And also to some extent upon the personalities of well

Howard Strickling for Defendants—Direct.

known directors? A. It has been proven many times. For instance, a picture like "Letty Lynton," as an example, or take "Libeled Lady," more recently, if it would have inferior people in that, people like Madge Evans or Betty Furness, people like that, the gross wouldn't have been as great as with Joan Crawford, Norma Shearer or Greta Garbo. 535

Q. Have you in any collected form reserved the publicity on "Letty Lynton"? A. No, I haven't. I have material of a similar nature that I could give you.

Q. No, I don't think that would do. Have you anything to do with the fan mail? A. Yes.

Q. Tell us in general terms what fan mail is. A. Fan mail are letters written to the stars, some requesting photographs, some of them wanting a letter, or wanting personal information. 536

Q. Yes. We have really had a good enough definition about that. A. Yes.

Q. But tell me what you do about fan mail. You answer it, in the first place? A. We send out photographs to everybody that writes in, and answer any personal letters.

Q. Have you any idea what the volume of Joan Crawford's fan mail was in 1932? A. Around 2,000 letters a week.

Q. And Montgomery? A. Montgomery around the same.

Q. Did that represent substantially the zenith of their fan mail, if you know? Was it ever materially higher than 1932? A. No. 537

Q. Do you regard fan mail as a good index of popularity? A. I do.

Q. And how did the 2,000 letters a week of Joan Crawford and Robert Montgomery compare, respectively, with the fan mail of other stars at that time? A. Very favorably.

Mr. Driscoll: Objected to as immaterial and irrelevant and incompetent, nothing to do with the issues that we are trying.

Special Master Auchincloss: Shorten it down as

H. F. Metcalf—for Defendants—Direct.

538

much as you can, Mr. Pollak. I think you have made your point.

Mr. Pollak: That is all.

(Whereupon, the hearing was continued and adjourned at the hour of 4:45 o'clock p. m., until 10:00 o'clock a. m., March 6, 1937.)

HEARING OF MARCH 6, 1937.

539

Mr. Pollak: Mr. Schwartz is going to examine this witness, with your permission.

Special Master Auchincloss: All right. Are you ready, Mr. Driscoll?

Mr. Driscoll: Yes.

H. F. METCALF, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Schwartz:

Q. Will you state your full name? A. H. F. Metcalf.

Q. And where do you live, Mr. Metcalf? A. In Pasadena, California.

540

Q. That is in the County of Los Angeles? A. The County of Los Angeles, yes, sir.

Q. How long have you lived in the County of Los Angeles? A. Since 1874.

Q. And, if it is not too embarrassing, how old are you? A. Sixty-two.

Q. What is your business at the present time? A. Realtor, the general business of realtor.

Q. And a realtor in Los Angeles means a dealer in real estate, does it not? A. It is a name given to a member of a local board who is affiliated with and a member of the National Board of Real Estate Exchanges.

H. F. Metcalf—for Defendants—Direct.

Q. And are you a member of such boards? A. I am, 541
yes, sir.

Q. And have been for a number of years? A. For about
30 years, 32 years.

Q. How long have you been a realtor? A. This is about
the 33rd year.

Q. Have you made an appraisement of the land upon
which this Metro-Goldwyn-Mayer Studio at Culver City,
California, stands? A. Yes, sir, I have.

Q. What has been your experience in appraisal work? A.
It has been rather varied. I have appraised both for the
city and county a great many times for alley and alley
opening and road widening. I was on the Appraisal Board
of the Mortgage Guarantee Company for upwards of five 542
years.

Q. What is the Mortgage Guarantee Company? A. The
Mortgage Guarantee Company is a company loaning money
on real estate.

Q. In Los Angeles? A. In Los Angeles, yes, sir. It has
been in business here about 20 years. It is still functioning
and active. I was on their Appraisal Board for better
than five years.

Q. Appraising what types of property? A. Appraising
all sorts of real property, acreage, office buildings, apart-
ments, residences. They loan generally on all sorts of
property.

Q. Continue with your experience as an appraiser, if you
had any other experience. A. I have appraised for the
Pacific Mutual rather freely. 543

Q. That is the Pacific Mutual Life Insurance Company
of California? A. The Pacific Mutual Life Insurance Com-
pany. I had occasion as Federal Receiver for the Sun
Realty to appraise business property in Los Angeles rather
freely. I was a member of the Appraisal Board of the Los
Angeles Real Estate Board for some two or three years, and
I have appraised generally for many purposes.

Q. Have you had any experience in appraising or deal-

H. F. Metcalf—for Defendants—Direct.

544 ing as a real estate agent or realtor, dealing in studio properties, motion picture studio properties? A. Yes. I have had some experience in that. I have had occasion to appraise the realty underlying studios before. I have sold them some property. I had occasion to subdivide and sell a portion of the United Artists Studio at one time, in 1928, I think it was, '27 or '28. We somewhat recently sold the old Christie Studio in its entirety.

Q. That is on Sunset Boulevard? A. On Sunset Boulevard in Hollywood.

Q. You sold that to the Columbia Broadcasting Company? A. To the Columbia Broadcasting Company, yes, sir, together with some adjacent property.

545 Q. You say you have made an appraisement of the land upon which this studio stands. When did you commence to work upon that appraisal? A. About two or three weeks ago, about three weeks ago, I think.

Q. And have just recently completed it? A. I have.

Q. And what did you do in preparation for that appraisement, or in preparing to give an opinion as to the value of the land upon which this studio stands? A. Well, categorically I began by making a map of the metropolitan area and locating the studios on it together with their several acreages, got all the information I could regarding other studios, which was rather meager, I approached the subject of this appraisal from such angles as I thought were pertinent, in fact, from every angle that I thought was pertinent.

546 Q. Such angles as what? A. Well, I attempted to work out a subdivision project here which projected the streets through the tract and put street work in.

Q. You mean in imagination? A. In imagination on paper, yes, sir, and sold it for such prices as I felt were pertinent at the time of this appraisal. I compared it in availability and suitability of purpose with various other properties in Los Angeles of a comparable nature. I found after some search an appraisal of an identical property

H. F. Metcalf—for Defendants—Direct.

with this, an almost identical property with this, the appraisal for which in 1928 had been accepted by governmental authority. I approached the subject from every angle that I could possibly think of, Mr. Counsel. 547

Q. Mr. Metcalf, give us some general idea, without giving us metes and bounds and descriptions, unless they are required. You have them, have you? A. I have the description.

Q. The bounded description? A. Oh, yes. I have the description of the property here, both legal and general.

Q. Give us an idea for the record of what this property consists, that is, the physical property. The property, in a general way, the general description of the property would indicate that there are 65 acres of land under this appraisal, 40 of which are contiguous to and fronting on Culver Boulevard and on Washington Boulevard. 548

Q. Now, Washington Boulevard is this main through highway upon which the studio fronts, the main entrance fronts? A. Washington Boulevard is the main arterial thoroughfare from Los Angeles to—

Q. To the ocean? A. To the ocean, to Santa Monica or Venice.

Q. To the Pacific Ocean? A. And Culver Boulevard is practically the same boulevard with an arterial thoroughfare between Redondo, Hermosa and Los Angeles.

Q. Hermosa and Redondo being beaches along the ocean-front? A. Beaches along the Pacific Ocean. 549

Q. Generally south of Santa Monica and Venice where Washington Boulevard terminates? A. That is correct, yes, sir.

Q. There is something about 65 acres, you say? A. About 65 acres, yes, sir.

Q. Now, what, in your opinion, Mr. Metcalf, was the fair market value of the land to which you have just referred and upon which this studio stands in the year 1931-

H. F. Metcalf—for Defendants—Cross.

550

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues.

Special Master Auchincloss: The record may note an exception.

The Witness: May I answer?

Mr. Schwartz: Yes.

The Witness: I placed a conservative fair market value as of the time indicated, namely, December 1, 1932, and thereabouts, I placed a very conversative value on this land of \$969,210.00.

By Mr. Schwartz:

551

Q. Would that opinion of the value which you give us apply as the end of the year 1932, as well as the end of 1931? A. Yes, sir, I think so.

Mr. Schwartz: You may cross examine, Mr. Driscoll.

Cross examination by Mr. Driscoll:

Q. You say you placed that value on the land alone?

A. Yes, sir.

Mr. Schwartz: What was that question?

(The question was read by the Reporter.)

The Witness: That is, free of any improvements either on the land or under it.

552

By Mr. Driscoll:

Q. This particular land is occupied by different stages used in the making of motion pictures? A. It is occupied generally by the buildings pertinent to a general moving picture set-up. How many stages there are, I don't know. There is one very large one, I know.

Mr. Driscoll: I have no further questions.

(Witness excused.)

ELI BENNECHE, having been first duly sworn, took the stand and testified as follows:

553

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Eli Benneche.

Q. Miss. Benneche, what is your position with Metro-Goldwyn-Mayer? A. I am the assistant to Mr. E. B. Willis, who is the head of the Property Department.

Q. And what was your position in 1932, Miss Benneche? A. The same.

Q. Would you tell us, in a general way, what the function of the department called, I think, props and set dressing is? Is that the official title? A. Yes.

Q. Just tell us what your department does, so the record may show it. A. Well, we supply all of the props, as you say, and we are given sets to dress, and we furnish them completely.

554

Q. The Construction Department erects them, is that right? A. Yes, and we follow them.

Q. If this is a correct summary, perhaps you can confirm it: You had in 1932, I believe, five interior decorators, is that right? A. Yes, I should think so.

Q. And about how many property men? A. Well, that is hard for me to say.

Q. Would you want to set a minimum on it, Miss Benneche? A. Well, for instance, if we had 10 companies going, we would have 10 property men. We have two divisions. We have a swing gang and the property men. A prop man is assigned to the company and he takes care of that particular company, and he sees that they are supplied with the necessary props. The swing gang man is a man that assists the set dresser in putting the furnishings in the set.

555

Q. One such man at least is assigned to each production, is that right? A. That is right, and an assistant.

Q. And an assistant? A. Yes.

Eli Benneche—for Defendants—Direct.

556

Q. I think we ought to have a definition for the record of props, which is an abbreviation. What do you call props, Miss Benneche? A. A prop is something in the picture that has a definite purpose. For instance, if we have to have a wagon, we call that a prop. In another instance, we may have several wagons, but they are just properties. Where there is just one prop, that means that it is going to have a definite purpose. For instance, one of our men leading will be riding on it, or will have some particular thing to do with that background, with that wagon. Take, for instance, hand props. We have many hand props on a set, but one hand prop, a special hand prop has to be okayed by the company.

557

Q. Okayed by whom? A. I mean the director.

Q. The director. A. Because that particular prop may have a closeup taken, or it has a definite reason in the story action.

Q. What would be a hand prop? A. Small things that you handle.

Q. An envelope might be a hand prop? A. Yes, or a mirror, or tooth brush. If you have a mirror it is going to be a closeup of it, and they are going to handle that thing, and you will see it on the screen.

558

Q. Well, tell us what a swing gang is. A. A swing gang is a group of men that are supplied for the set dressers when they dress sets. For instance, a set dresser will be assigned to a set to dress on Stage 9, and he will go to the foreman of his men and he will say, "I need four men." He is given four men to go out and do this work. It is just more or less labor work like picking up desks and all that sort of thing.

Q. Will every set have a swing gang? A. For dressing?

Q. For dressing? A. Yes.

Q. That is, besides the prop man and the assistant prop man, is that right? A. Yes. That has nothing to do with the prop men at all, because he is off somewhere with his

Eli Benneche—for Defendants—Direct.

company. When the set dressers finish dressing the set, 559
those men go back into the department. They have nothing
to do with the company.

Q. The prop man is continuously with the production
unit? A. Yes. He is part of the unit.

Q. Though supplied by your department? A. Yes.

Q. I see. You defined a property as some physical ob-
ject that has a purpose in the picture? A. Yes.

Q. Well, isn't the whole physical equipment, apart from
the stage, regarded as property and within your jurisdic-
tion? A. Yes.

Q. In other words, nothing is supposed to be in the pic-
ture that hasn't a purpose, is that right? A. Right.

Q. You also call external objects, I suppose, property, 560
including even objects that are affixed, like flowers, or don't
you? A. Well, it depends.

Q. I beg your pardon? A. It all depends. The Con-
struction Department takes care of that, I think they do.
I really don't know. There have been some changes in it
now.

Q. You have florists in your department? A. Yes, we
have florists, but that is just for small flowers.

Q. Oh, I see. A. We don't have charge of the land-
scaping.

Q. Excuse me. That has already been explained as a
part of construction. A. Yes.

Q. But you would handle a vase of flowers, for example?
A. Oh, yes, we handle that.

Q. And you have an enormous collection of properties,
is that right? A. Yes.

Q. Including some original antiques? A. Yes.

Q. How much of a physical plant has your department,
Miss Benneche? A. How do you mean?

Q. Well, have you a building, to begin with? A. Yes.

Q. How many of them? A. In the department?

Q. Yes. A. I should say around 150.

Eli Benneche—for Defendants—Direct.

562 Q. You mean 150 employees? A. Yes. Is that what you mean?

Q. No, I meant how many buildings. A. Oh, we just have one, and part of this one (indicating).

Q. And you have an upholstering department? A. Yes.

Q. A cabinet shop? A. Yes.

Q. A paint shop? A. Yes.

Q. And you manufacture your own artificial flowers? A. Yes.

Q. Do you manufacture other props, Miss Benneche?

A. How do you mean?

563 Q. Well, here on the place if you want some particular kind of cabinet, or I don't know what all, do you sometimes manufacture it, or do you always buy it? A. Oh, yes, we do quite a bit of that.

Q. That is "Yes" to buying, or "Yes" to sometimes manufacturing? A. Both.

Q. That is, you do sometimes manufacture? A. Yes, we do.

Q. And you have a group, I suppose, of trained carpenters and cabinet workers? A. Yes.

Q. And upholsterers? A. Yes, sir.

Q. And what other technicians, if any, have you? A. Well, we have the paint department, and we have our own lamp shade department, and linen separate.

564 Q. How about furniture, furnishings? A. We also have that.

Q. You have said interior decorators already, have you not? A. Yes, I have.

Q. Of course, the repair of props comes under your department? A. Yes, sir.

Q. And the purchasing of new furniture if you need it? A. Yes.

Q. Do you also take care of the furnishing and decorating of the various offices of M-G-M? A. Yes, we do.

Q. The manufacturing of draperies, I suppose, for sets? A. Yes.

John Arnold—for Defendants—Direct.

Q. You have said you thought there were about 150 persons in the department in 1932, is that right? A. Yes. I wouldn't want to make that as a definite statement. 565

Q. I see. I think that is not so very important, just what the number was, and I think you have given us what I wanted.

Mr. Driscoll?

Mr. Driscoll: No questions.

(Witness excused.)

JOHN ARNOLD, having been first duly sworn, took the stand and testified as follows: 566

Direct examination by Mr. Pollak:

Q. Mr. Arnold, what is your position with M-G-M? A. I am in charge of the Camera Department, in charge of all the cameramen, the routine follow-up and preparation, assignment of crews, technical problems that come up regarding photography.

Q. Did you hold the same position in 1932? A. Yes.

Q. Tell us, in a general way, what the Camera Department does. A. Well, we start out, first, of course, with the script of a picture which we analyze and we find out who the stars are, or featured players, and, of course, certain cameramen are assigned to certain stars who never work except when those stars work. Then, after that, we consult with the cameraman about various ways and means of photographing certain sets, and colors of sets. 567

Q. You consult with whom? A. The cameraman that goes on the picture. Then there is the assignment of a crew for him, the assignment of camera equipment. We follow that picture completely through to the finish. In other words, it is an expert case of supervision over the whole thing.

John Arnold—for Defendants—Direct.

568

Q. You assign a camera unit, of course? A. Yes.

Q. To each picture? A. That is right.

Q. And what does a unit consist of? A. Well, on some pictures a unit of five men, and on some it is a unit of 10. It depends on the type of story, or the type of action which the thing calls for.

Q. What equipment do these cameramen take out with them? A. Well, they have the camera, the motion picture camera, then what we call a bungalow. That is a housing that goes around the camera. That is to keep it silent, and the supporting equipment, tripods and perambulators that are used for moving up, back and forth to the shots. Then the still cameraman has a still camera to take out. He handles just a still camera for making stills. Then we have reflectors and lights, and so forth.

569

Q. We have had a lot of talk about it. Will you tell us what a goboe is? A. Yes. A goboe is in different sizes. It is 18 inches or 24 inches wide, possibly six feet high, and it is black cloth, or painted black on both sides. That is used to shade. For instance, if there is a strong light hitting you in the eye, we bring that in to the sides to shade off all extraneous light hitting toward the camera.

Q. I see. Thank you. Now, these cameramen that you send out are, I suppose, real artists, are they not? A. They are.

570

Q. Very highly trained men? A. They are.

Q. Now, it is a matter of individual selection in each case what cameramen to assign to a picture? A. Yes, because, as I said before, certain men can photograph certain stars better than others. It is just some little individual trick of theirs, or knack, which enables them to do that.

Q. That is, even with the finest machines, individual skill does enter into camera work? A. That is right.

Q. And these differences of function, do they apply also to the photographing of particular sets or scenes? A. Yes, because a man may go to work and light his set and take

John Arnold—for Defendants—Direct.

the thing entirely away from the star, or the featured player. So he must always keep that in mind so as not to bring the set up to the illusion where it takes away from the players. 571

Q. Your department is called in at the beginning, the break-down of the story, is that right? A. Yes.

Q. In other words, to determine what camera unit or men to assign? A. That is right.

Q. And once assigned they work with and under the director, I suppose? A. That is right, except on photographic problems. Then I cooperate with the cameramen on that picture as to the best ways and means of doing certain things, tricks, and so forth.

Q. And if need be, you and the director confer? A. That is right. Very often a director wants something we can't do, so I go to the director and explain the reason to him. 572

Q. I suppose also you try to devise new techniques? A. Always.

Q. New techniques that will get what he wants? A. Yes.

Q. Mr. Arnold, in general, I haven't bothered with giving the qualifications of witnesses, but could you tell us, in a very general way, what your experience in camera work had been before you came here? A. Well, I have been through all the mergers and things. I have been with this firm a little over 20 years. 573

Q. And before that where were you? A. With the Biograph.

Q. I see. And before that? A. Thomas Edison.

Q. In other words, you have specialized in camera work all your life? A. That is right.

Q. And in motion picture work as long as there has been a motion picture industry? A. Yes.

Q. On a big scale? A. Yes.

Q. Do you know one Mr. Marsh? A. Yes.

Q. He was, I believe, the director of photography in "Letty Lynton"? A. That is right.

John Arnold—for Defendants—Direct.

574 Q. Is that the same function as head cameraman? A. Well, in a sense he is the head cameraman on that company.

Q. That is what I mean. A. Yes.

Q. You mean on that unit? A. On that unit.

Q. I see. Is he still living? A. Yes.

Q. Was he in 1932 a man of distinction? A. Very much so.

Q. An especially skilled artist? A. Yes.

Q. He had a long experience? A. Yes.

Q. Tell us, in a general way, what the personnel of the department was in 1932. A. You mean in the number of people?

575 Q. Well, give it that way, if you want, yes. A. I think in the neighborhood of 55 or 60. I don't know exactly, somewhere between that number.

Q. Including about how many head cameramen? A. About 12 at that time.

Q. I see. And about how many second cameramen? A. I would say somewhere in the neighborhood of 18 or 20.

Q. And assistant cameramen? A. About 20 or 25.

Q. I see. Would every unit have a head, a second and an assistant? A. Yes, and a still man.

Q. And a still man? A. Yes.

576 Q. The still man for closeups? A. No. The still man makes all the 8 x 10 still pictures and portraits, and things on the set for advertising purposes.

Q. The stills being for advertising purposes? A. For advertising and publicity campaigns, and things of that kind. Those are the 8 x 10 photographs that you see around.

Q. Do you keep a whole force of mechanics, or a number of them, in order to keep your cameras in repair? A. Yes, we do.

Q. Have you any other mechanics? A. Well, yes, electricians that take care of the motors, and so forth, and we

John M. Nickalaus—for Defendants—Direct.

have clerks that take care of the equipment that check it in and out. 577

Q. Your cameras are electrically driven? A. Yes.

Q. Now, there is reference here to a motor maintenance man. A. That is the electrician. We call him the motor maintenance man. He takes care of all the motors and cables, and so forth. They are checked daily.

Mr. Pollak: That is all.

(Witness excused.)

JOHN M. NICKOLAUS, having been first duly sworn, took the stand and testified as follows: 578

Direct examination by Mr. Schwartz:

Q. State your full name, please. A. John M. Nickolaus.

Q. Mr. Nickolaus, what is your position with the Metro-Goldwyn-Mayer Corporation? A. Superintendent of Photography.

Q. How long have you occupied that position? A. Eleven and one-half years.

Q. What was your experience in a general way in the same type of work before coming with Metro-Goldwyn-Mayer? A. I held the same position with Universal, later at Paramount, then was part owner in a laboratory I financed and developed myself. 579

Q. The Standard Laboratory? A. Standard Laboratory.

Q. And then came here? A. And then I came here.

Q. The Master and counsel have been through your wonderful laboratory, but tell us, in a general way, for the record what the functions of your department are. A. Well, my chief functions are, in a sense, supervision of anything photographic in the laboratory.

Q. Pardon the interruption. You have nothing to do;

John M. Nickolaus—for Defendants—Direct.

580 your department has nothing to do, with the actual photographing of the picture? A. Just merely in an advisory capacity, or a cooperative capacity.

Q. I see. Go ahead. A. You can plainly see that it would be pretty hard to eliminate an organization that is going to supply the negative stock to the cameramen and then have it come back and process it according to the art applied to it on the set without in some way being tied into it from the very inception.

Q. Well, yes. I simply wanted to distinguish between you as head of the laboratory, or processing department, and the director of photography who is head of the actual photographing of the picture. Go ahead, Mr. Nickolaus. 581 A. Therefore it brings us up to the fact that we supply the negative to the cameramen, in the first place, take it back and develop it, go through the necessary functions—that includes, however, picture negative and sound track negative. We develop it, segregate it according to the scenes that are to be printed, and not to be printed, synchronize the sound track and the negative, preparing it for daily printing, making the daily prints and distributing them to the necessary departments, which include in this case the sound department, the producer, the cutter and the director.

Q. That is what we call rushes? A. Rushes.

Q. And then you also process the release prints? A. 582 Well, under our supervision. Then we have the care of that negative until the picture is completed. Then we have to trim that negative and match the master print which the Editorial Department has developed from the whole process of making the picture.

Q. In the use of the word "development" there, you do not mean development in the sense of processing, which is your function? A. No.

Q. When you said the Editorial Department develops the negative, you mean it puts it into continuity? A. They are put into continuity. Then it is directed back to this

John M. Nickolaus—for Defendants—Direct.

department for printing. The negatives are brought out 583 of the vaults and carefully cut to fit the print they have assembled. We have a final negative now. The negative goes to the laboratory then for release printing. We make all the release prints here, for the domestic market and some for the foreign negative. Then the negative is shipped east for certain types of work that we don't do here, couldn't do here, because we are too far away from the foreign department. That is to superimpose titles in all different languages, and so forth. That is done in New York.

Q. Then the prints are ready for distribution by the distributing organization to the theatres? A. We distribute them to the exchanges who, in turn, distribute them 584 to the theatres.

Q. Now, what departments have you under your control? A. The laboratory, motion picture laboratory, and still laboratory, machine shop and projectionists.

Q. Do you have a duplication department? A. Yes. That comes under the heading of the picture laboratory, and also a trick department, trick processing department.

Q. Were your physical facilities, and also your functions, substantially the same in 1931-32 as they are now? A. Yes.

Q. What is the personnel of your department, not by name, but by people? A. I should say those combined departments would average, year in and year out, about 585 300 to 350 people.

Q. That would be true as of 1932? A. Yes. It doesn't change much.

Q. And into what would that large number of people be divided as groups? A. Well, in round figures—

Q. I don't mean figures. To begin with, you have an assistant, have you not? A. Yes.

Q. And you have a plant mechanical engineer? A. Yes.

John M. Nickolaus—for Defendants—Direct.

586 Q. Now, what other department heads? A. We have the heads of practically every department, like we have a head of the duplication department, we have a head of the release department, we have a head of the negative department, negative assembling department, and the picture sound department.

Q. And the trick process department? A. The trick process department, the assembling department, the release assembling department.

Q. And each one of those men, I presume, is a foreman? A. Well, you can call him a foreman.

Q. Each one of those men have men working under them? A. Yes.

587 Q. Now, who is your assistant? A. Tucker.

Q. Who was he in 1932? A. The same man.

Q. And you have a man by the name of Wise? A. That is the plant engineer, the mechanical plant engineer.

Q. And what position did he hold in 1932? A. Exactly the same position.

Q. And what is his background, do you know, for this work? A. Well, I consider him the best versed motion picture mechanical engineer in the business today. His previous experience, his very first experience in this business, entering it as a high-class mechanic was with Bell & Howell, Chicago. He later represented Bell & Howell in Hollywood, the Hollywood office; he left there and took a similar position to the one he has now with me at Paramount. Then later he went to the Standard with me, and later came here with me.

588 Q. Bell & Howell are well known manufacturers of motion picture cameras? A. Yes.

Q. And equipment? A. Possibly known as the best motion picture precision machine people in the country.

Q. And what are Wise's essential functions with you? A. Well, briefly, he is in charge of all the mechanics in the plant, and practically everything in our plant is mechanics.

John M. Nickolaus—for Defendants—Direct.

He designs all our machinery, supervises its construction and supervises its operation. 589

Q. And do you build precision machinery of your own in your plant? A. We build whatever we have to build. For instance, all our developing machines are built by us.

Q. And designed by you? A. Designed and built. The Slitting machines, there are certain types of machines that we use that you can buy, that aren't made. There are other types of machines that are made but are not precision enough for our particular requirement. We are sticklers for accuracy, and if we can't buy it, we make it.

Q. You talked about precision machines, you mean for what purpose? A. Well, any machine that we use is a precision machine. It has to be. It is very easy to figure that out. 590

Q. What I am trying to get at is, what is the object or result of your work with precision machines, what result do you get? A. Well, very simply for the reason that we are in a peculiar phase of photography in motion pictures, inasmuch as we work so small and we enlarge to such a terrific degree. No place else in photography does that condition prevail. Invariably they make a small negative and enlarge it, but that is for a picture in your hand. We have a tough proposition, a thing that in the early days of pictures held it back, and they said it couldn't be done. However, we are doing it, but we are doing it by the means of high-class precision machinery, and until we had that we couldn't make moving pictures. 591

Q. To what extent do you magnify that little frame that we see upon the positive for the screen? A. We figure that the average increase in size is about 40,000 times in the average theatre.

Q. That is, each one of those little frames are something like an inch or inch and a half long. A. Less than that, three-quarters of an inch, but since we went into sound it is reduced. It was three-quarters by an inch in the early

John M. Nickolaus—for Defendants—Direct.

592 days, but we made our game a little harder by reducing it when we went into sound to make room for the sound track.

Q. What is the size now of the normal frame? A. It is less than three-quarters of an inch.

Q. And that is magnified 40,000 times on the screen, approximately? A. The average screen in the United States, I should say, is 20 feet today. Some of them go as high as 40 feet.

593 Q. To what extent have you reached precision in your work? A. Just as fine as it is possible mechanically. For that reason we have a lot of difficulty, and will have for many years until we get some more trained men doing our class of work. They have to be specialized. For instance, the gauge makers come from some of our finest plants in the east. While they are finished, polished, trained men, we still have two or three years' work to do with them to familiarize them to the thing we are doing. It is that terrific enlargement. The average mechanic can't get it. We have to work finer. For instance, the ordinary machine is a precision machine. I mean it can have a variation possibly in a fit of two-thousandths of an inch. That doesn't mean anything. You can't see it and you can't feel it. It is a physical machine. But ours is not a physical machine in that the thing it is reproducing has to be enlarged 40,000 times, so a variation of two-thousandths of an inch is out of the question. We have to get the finest degree of accuracy where we are now, but even that isn't good enough. As the years go by we get a finer degree of refinement that makes our pictures better. For that reason you have less eye-strain today than you had two years ago. You had less eye-strain two years ago than you had five years ago, and so it goes back to 20 years ago when the picture wobbled all over the screen. You would be blind if you saw two features in one night. We can see two features in one night today and the fatigue is not so great.

594 Q. It is great enough, but not so great. A. Well, I should

John M. Nickolaus—for Defendants—Direct.

say it is less. M-G-M, by their research, have eliminated, I think, as we see it today, the last vestige of eye-strain:

595

Q. What was the type of that research? A. That is what we call turbulation. Up to two years ago the average theatre had equipment good enough to give you a steady picture mechanically. It didn't move. It was steady mechanically, but it did move chemically. You have to go into quite a chemical argument for that, but nevertheless the picture was steady mechanically, but moved chemically. We put in about two years of hard work on it and succeeded in taking the chemical movement out of it. Now we have a mechanically steady picture and a chemically steady picture.

Q. That is what you call turbulation? A. Yes. We have taken out the chemical unevenness by turbulation. Turbulation is the term for a terrific agitation at the surface of the film during development.

596

Q. To what extent, in a general way, were you doing that type of experimentation for improvement in 1931-32?

A. Well, that research was going on at that time.

Q. That particular research? A. Yes.

Q. And I presume research of other types? A. Oh, yes. We never stop. We can't afford to stop in this business. I will give you an illustration. When we succeeded in taking the directional effect, which is the uneven development, out of our negative, we had no idea that there was any in positive. We didn't think there was. We had no way of telling since, in the negative that you are printing, you couldn't see through it. So after we had succeeded in putting turbulation on all our negative developing machines—I should judge it cost us about \$20,000.00—it just proved one thing, that we had directional effect in positive. So we had to start all our research all over again to find out what we had to do to get it out of the positive, because it would be ridiculous to take it out of the negative and not take it out of the positive. One proves the other.

597

Q. Did you accomplish it? A. Yes.

John M. Nickolaus—for Defendants—Direct.

198 Q. With the positive? A. Yes.

Q. In other words, while your actual daily processing is going on, you are also constantly conducting experimental and research work for the betterment of your product? A. We have to do it.

Q. And you are doing it? A. Oh, yes.

Q. And have been from the beginning? A. Yes. That is one of the principles of our company. They want us to do that. We don't necessarily have to make the grade on everything we try, because in research that doesn't happen. If you get one out of five of your chances in improvement of a product, that is worth going after. But it is hard to say how much money we spend in research because it varies. Some tricks we go after are not so expensive. Some of them cost a lot of money, they run into a lot of money. Sometimes we spend as high as \$20,000.00 or \$30,000.00 and quit right there because the money we have spent convinces us we can't do the thing we are after.

Q. As an illustration of the type of experimentation and research that you do, can we properly cite the toning work that you have done in the last two or three pictures? A. Yes. That is a fair example of our progress as we go along as a result of that kind of work. Had we not succeeded in taking the directional effect out of the negative and the positive, we should never have attempted that.

600 Q. It couldn't be done without turbulation? A. No.

Q. And by toning, we mean the sepia color effect that you produced in "The Good Earth" instead of black and white? A. Well, any applied color as we would apply it in a laboratory.

Q. And in "May Time", which was just previewed the other night, you got a pink tone? A. We have a sepia and a pink.

Q. That was a result of how much experimentation? A. That is right.

Q. I say, how lengthy was the experimentation in order

Douglas Graham Shearer—for Defendants—Direct.

to get that result? A. Well, we have been working on that for about a year and a half. 601

Q. Did you build the machines by which that effect was produced? A. You mean the tone?

Q. The toning machine. A. We only built one. That is still our experimental machine. We have put it in production, but it is all we have going.

Q. You are still experimenting? A. Yes, but we won't build the rest until we do some more testing or research or refinement, whatever you want to call it, because we are not satisfied that we have got the best result we can in our present machine. But that is merely what the machine is. It is really a trial machine. They are still in research. But there is no question about the fact that our new machines will look entirely different from that machine, because we have already found a lot of weaknesses in that set-up. 602

Q. Are you pretty familiar with other laboratories in the world, laboratories of your type? A. Yes.

Mr. Schwartz: Very well. That is all, Mr. Nickolaus. Any cross-examination?

Mr. Driscoll: No.

(Witness excused.)

DOUGLAS GRAHAM SHEARER, having been first duly sworn, took the stand and testified as follows: 603

Direct examination by Mr. Schwartz:

Q. State your name for the record. A. Douglas Graham Shearer.

Q. How old are you, Mr. Shearer? A. Thirty-seven.

Q. What is your position with Metro-Goldwyn-Mayer Corporation? A. Director of Recording.

Douglas Graham Shearer—for Defendants—Direct.

604 Q. In other words, you are the head of the sound department? A. Yes, sir.

Q. And how long have you occupied that position? A. Since the beginning of sound in the studio.

Q. Which was about when? A. 1928. June, 1928, I was assigned to the work, but we didn't start recording until toward the end of the year.

Q. To what extent, if any, did you participate in the installation of sound equipment in the studio? A. Well, I was wholly occupied with it. That is, my participation was complete.

605 Q. In other words, you supervised the installation of the sound in the studio? A. Yes, with what construction work had to be done, which, of course, was taken over by the people qualified in the construction of buildings, and so forth.

Q. Now, although we have been through the studio and you have given all of the people here present a demonstration in your plant as to its function, will you tell us for the record here, briefly, please, what the functions of your department are and were in 1932? I assume they are the same now as they were then? A. Yes, they are. Well, the function of the department is to provide the facilities and the technique to make a picture that otherwise would be silent into a sound picture. It consists of making available the proper type of equipment to record sound, sound to the limit of the known technique at any time. That is, we try to supply the most modern equipment that we know of or, failing in that, we have assumed to develop that type equipment.

Q. That is to say, the design and construction of it here yourself? A. Yes. We have designed and constructed a good deal of it. We have designed a lot of other equipment that is sold to us by outside companies after the design is completed.

Q. The equipment designed and developed here is used by other motion picture companies too? A. Yes. The elec-

Douglas Graham Shearer—for Defendants—Direct.

tric companies supplied us with certain basic equipment in the beginning which was, as far as they could anticipate, or was supposed to be, motion picture sound recording equipment. It actually was, in the sense that you could take a certain scene made in front of a camera and photograph and record what went on just in front of that camera. However, when cut together in a picture that would have made just a series of shots disassociated, no smoothness or continuity between them. Also, certain scenes in motion pictures that were customarily used in silent pictures could not be made with that new equipment on account of the physical inability to enact the scene in a manner that could be recorded and photographed both together, so that required the evolution of methods of apparatus to circumvent the physical difficulties that were obvious if you were to try to make a complete scene happen with sound and picture both at once in front of the camera.

Q. Was that development made here? A. We did a great deal of that work. Our developments number about—I have a list of items—there are about 187 in number up to November 10, 1934.

Q. Give us a general idea of some of those 187 developments, briefly. You are now looking at a memorandum that you prepared yourself recently? A. No, this was prepared in 1934.

Q. By you? A. Yes, sir. The list shows, briefly, a resume of the method, equipment and technique which has been developed and adopted by M-G-M Studios as a result of the advanced requirements of sound picture recording, as well as other elements affecting film in the laboratory and camera department. As stated in connection with a similar summary made in March, 1932, in many cases no recommendation had been received by the electric companies for the methods and apparatus needed, and in other cases recommendations had been suggested and analyses had been received by us after our adoption of a necessary device or method.

Douglas Graham Shearer—for Defendants—Direct.

610

Q. I want to get an idea. A. That qualifies the detail. You want to pick out one item?

Q. Yes, one or two items. A. Pre-scoring is an item of some importance.

Q. What is pre-scoring? A. The method of photographing action in exact synchronization with previously recorded sound, to be ultimately released with the picture on special key or tempo tracks. The latter are used when the scene is not ready at the time of photography or produced picture effects which could not be otherwise handled in editing.

Q. Did that particular process require the designing and construction of machines? A. Yes, it did.

611

Q. Those machines have been adopted by other companies or studios? A. Yes, they have.

Q. By the electric companies? A. Yes.

Q. Machines are now made with your development? A. Yes.

Q. Just give us something of some major importance. A. Push-pull recording and reproducing.

Q. Explain that. A. That is a type of recording where two sound tracks are used adjacent to each other to increase the range of volume that can be recorded and reproduced. It was originated, developed and applied to commercial use in its complete method and equipment with variable density film. The method provides increase in volume range, noise reduction with simplified apparatus. It is approaching the ultimately perfect system which required new light valves and new optical equipment, new reproducer heads, and is being sold now by the Electrical Research Products to the other studios.

612

Q. While you are doing your daily work in your department, are you also constantly conducting experimental and research work in connection with the development of your methods? A. Yes, we are.

Q. It is going on all the time? A. Yes.

Q. Was that true as of 1931-32? A. It was more true

Douglas Graham Shearer—for Defendants—Direct.

then. For instance, in 1929 we had double the number of 613
employees that we had in '31 and '32. The necessity of
having all those men in the early days was to foster the
rapid development of these methods and devices which the
pictures later on received the benefit of.

Q. Have you given us pretty completely the functions of
your department? A. No, I haven't.

Q. Will you continue? A. After we have a system avail- 614
able for use in the studio, our next function is to analyze
the shooting scripts of each picture to be made and pick
out any problems that might occur in that script which
requires special treatment. We try to pick those out ahead
of time before the script is put into production. We as-
sign a crew to the company, taking into account the tempera-
ment of the director, the people he is to work with, and
so forth and so on. We select a man who we think can
work more smoothly with the particular picture, and then
we provide facilities on each set every day by dispatching
the channel wiring, providing the recording machines, set-
ting up the microphones, and the crew which has been
assigned to that company uses those facilities during each
day's work. That film is recorded during the day and sent
down to the laboratory where it is developed, and the fol-
lowing day it comes back to us where we inspect it. We
analyze the quality of the scenes, reject any scenes which
are inadequate from a technical standpoint, make remarks 615
on a log which is sent to the producer, director and film
editor, as to what scene we think most advisable to avoid
or to use in special cases where some item in the scene might
pass their notice. In that manner we clear off each day's
work and pass it completely out of our hands as quickly as
possible to the editor, who then takes that material and
literally builds his picture out of it with the picture film
associated, of course. During that editorial period we don't
have much to do with the film. After the picture is
finished shooting and the editorial work is complete enough
to run the production in more or less continuity, it again

Douglas Graham Shearer—for Defendants—Direct—

616 comes back to us for the addition of sound effects and corrective measures, such as bad jumps in the sound, or irregularities which have appeared after the editorial work is done. We take it in and we give it a brushing up, so to speak. We supply sound effects. A sequence such as the earthquake in San Francisco would come to us, just the picture film alone, no sound whatever with it. We assign a crew to that and they either obtain from our sound film library the necessary sounds, or they go out and actually create new sounds that might not be in the library which would be suitable for composing an earthquake effect in that sequence. During the time we are running our

617 daily, that is, the dailies are each day's work that we inspect that I mentioned before, we have a man who watches for any sound in the ordinary sense which could be used for library purposes. As the scenes ~~run by~~, if he should hear, for instance, an old car drive up and the brakes squeak as it stopped, that scene would be noted on a log and the log sent down to the negative laboratory and that particular negative would be taken out of the regular vault and put in a special vault and saved as a library stock scene. That allows us to use that scene in the future when we should

618 want to have such an effect as that, if we didn't have one when the picture was shot. After the sound effects have been built into the picture, we have presumably recorded a physical score for all of or some parts of the picture. I say "we have"—a musical score has been made which we have recorded, and that musical score is lined up in conjunction with the various reels of the picture, or the parts of the reel that it is intended for. The sound effects, musical score, dialogue track and the whole are re-recorded on to one single film, from which we can make a print to take out and show to the public. That print is only one copy. That is, we couldn't make a number of those prints. The negative from which we made it wouldn't be of a type where we could print many issues. The print we would derive from that would have to have special handling in

Douglas Graham Shearer—for Defendants—Direct.

order to make it acceptable for the picture theatres in the intended version. We take that out and show it to the public and get their reactions. 619

Q. That is a preview? A. At a preview. If, either for technical reasons or dramatic reasons, any part of our sound work is unsatisfactory, we then have an opportunity to correct it, having the public as a guide, as to what we think would be the best correction to make. That is, the public reaction is taken strongly into account in those corrective measures.

(Here followed discussion off the record.)

By Mr. Schwartz:

620

Q. Now, to get back to our record, you were just telling about re-recording. You remember that the Master and counsel made a tour through your sound department. A. Yes.

Q. And we finished our tour at a little projection room where part of the picture was thrown upon the screen where two men were sitting, working at the controls. Is that the department where the re-recording is done? A. Yes, it is.

Q. And through that, as we were told by you, a number of separate prints, one print, for instance, of the train whistling, another print of a bell ringing, another print of dialogue, and another print of music are put through an operation by which they all come out together on the same final print? A. Yes. That operation, by the way, was a development that was made in the studio. 621

Q. Of re-recording? A. Yes, it was. When the initial equipment was supplied to us, and the initial technique, we did not anticipate that.

Q. How did you get all the various effects together before this development? A. It was necessary to make the scene with all the effects present in the original scene. We had scenes made here in the very early days where a whole

Douglas Graham Shearer—for Defendants—Direct.

628

new print on all the sound track and other effects that we use there, is then assembled in proper relationship on different reels and a re-recording job is done from all these prints which supplies us the negative which we hope to use for the final printing of copies, the printing of copies which we distribute to the theatres. That operation of revising and re-recording for previews I have seen happen five and six times on some pictures. It is usually twice, and rarely they do it once, and quite frequently about three times.

629

When the print from the re-recording negative is made, it comes up to us with the sound picture both together on it because at the same time the picture negative has been receiving similar treatment in the hands of the laboratory. We then have what we call a movietone answer print. Due to the form of the released sound track having certain limitations—the released sound track is of a different form than our original track, our original track being a special push-pull type which I spoke of—we then release our product with the sound track of a conventional form track on account of the theatres throughout the country not being equipped to run the newer kind of sound track as yet. The standard sound track has certain limitations with respect to natural volume range that can't be obtained without excessive surface noise or background hiss. We developed a technique of recording or re-recording each scene in a picture more or less for what it is worth with respect

630

to that particular section of film. That is, if we have a softly spoken scene or sequence, we don't necessarily record that softly on the film, because if we did, the background noise would be high. That is, if we only used 10 per cent of the available range of the film with the desired record, it would be the same effect as receiving a distant radio program. We would have lots of atmospheric disturbance because of the weakness of the signal. There would be a lot of natural disturbances that would come in on the wire as a matter of course. Now, we record that particular sequence more robustly on that piece of film so that the

Douglas Graham Shearer—for Defendants—Direct.

ratio of the desired signal to the extraneous and unavoidable noises of the film medium itself is higher. That ratio is higher. Instead of recording to 10 per cent of what we could on the film, we would record to 80 per cent. Then by a laboratory move we print down the sound track to a darker density than the former sound track density. When we print down a sound track, that robust signal which we have laid down or there more robustly than we wanted is reduced in strength because the dark print inhibits the amount of light coming through the photo-electric cell system.

631

Q. And also correspondingly reduces the extraneous noises? A. Obviously, because they are carried on the same medium as the desired signal.

632

Q. Have you about completed the actual general function of your department? A. This is the last step in our treatment of the track. The movietone print that I spoke of is run on the screen in front of us and we note the scenes that need this printing down treatment that I described, and we give the laboratory directions to that effect. They incorporate those changes in the printing light intensities and make us up a second print. We observe that as to whether these corrections have operated correctly, and if so, we tell them to go ahead with their release copies which they print up in number and distribute. If not, we make further corrections and then finally give them an okay on the negative.

633

Q. Will you give us, in a general way—I don't care about names, of course—the personnel and departments of your department, and the subdivisions of your department?

A. You want them as of now?

Q. As of '32. A. '32.

Q. '32. Before you go into that, essentially all that you have given us so far applied to '31 and '32 as well as today?

A. Yes.

Q. Will you give us some idea of the extent of your

Douglas Graham Shearer for Defendants—Direct.

622 orchestra would play on the set while the actors were doing their scene. It was very cumbersome.

Q. They were all trying to out-holler each other? A. Yes, and also the scene had to be planned in such continuity that the music could continue right along, which is almost an impossible feat to make it a satisfactory scene. Lionel Barrymore directed a short subject for us where even the title music and the end title music was included right in the scene on the stage. All during the making of the nine-minute scene that orchestra was sitting there waiting to play when their time came. That was because we had no apparatus or method developed for re-recording from separate tracks to a finished negative.

623

Q. By reason of this development of which you speak, you are now able to take your orchestra by itself in a separate room, and your dialogue by itself in another room, and all other effects by themselves, and then bring them all together at the finish? A. Yes, we are.

624

Q. Now, will you continue with your recital? A. I believe I reached the point where we had prepared a preview negative by re-recording it, which negative would be used only for that one preview print. After the preview has been digested by the producer and the other people interested in the quality of the picture, certain changes are made. The picture might be shortened. Entire new sequences might be photographed and recorded for it. The editorial arrangement might be changed. In any case, the picture would come back to us for further treatment after the physical changes in the film of the picture were set, and we would have to re-arrange our complete line-up of sound effects, music, dialogue and other elements that originally went into it, and usually we would re-do the re-recording job for a second preview. That is nearly always the rule. It is a very exceptional case when we have one preview and go to press, so to speak. The second preview is a repetition of the technique of the first, and after further changes have been made on the second preview, when we are satisfied

Douglas Graham Shearer—for Defendants—Direct.

with the appearance at that time, we take all our effects, music tracks and other elements that went into the sound end and give them a thorough going over, brushing up, removing little spurious clicks or damaged film that might have caused an extraneous sound, sometimes adding a frame or two of film on the end of a scene where a word has been clipped off a little too shortly, or where the interval in a speech between one scene and another has the wrong cadence or length. We prepare a master print from the last editorial print. 625

Q. The last editorial negative? A. No, the last editorial print.

Q. The print. I see. A. That master print is then sent down to the laboratory with whatever indications we have inscribed on it for treatment in negative cutting. That is, we might have the end of a sound scene on which we mark "Extend this scene two frames long," and that might be to avoid the clipping off of a final syllable of a word, or the cutting too close to someone's speech. When the negative has been cut, which is done by getting out all the negative that has been recorded and photographed on the picture and selecting the scenes, the negative scenes included in the master print which we have sent down there, when that negative has been cut and joined up, properly spliced, and the splices treated on the sound tracks so they won't make a noise as they go through the reproducer, we then get a complete, fresh print off the cut negative. That is this sound print I am speaking of. We also take our negatives out of the music tracks that we have been using for re-recording and get a clean, fresh print from them. The reason for that is, these prints we have been using in re-recording operation and in the editorial work have been man-handled quite a bit. They have been run back and forth through little viewing machines and they have been dropped on the floor, and they have been handled and they contain a lot of noise and extraneous disturbances that we don't like. So this new print from the cut negative, and 626 627

Douglas Graham Shearer—for Defendants—Direct.

634 department buildings and departments and personnel in 1932 in a general way? A. In 1932 there were about 100 people in the department, divided up with an associate assistant engineer to me, an amplifier system supervisor, a recording room supervisor, a re-recording supervisor, sound film editing supervisor, a man in charge of sound effect cutting, storeroom, projection; that is, reproduction machine maintenance supervisor, a foreign sound effects department, traffic and office department and storeroom, a man in charge of photographic sensitometry, light valves and test equipment.

635 Q. And, of course, necessary assistants and employees in each department under the supervisor? A. Yes. The amplifier system supervisor would have charge of the recording mixers, those men who operate on the set with the company. Also their stage men, that is, their microphone boys, the amplifier men who work in the amplifier rooms on the patch courts, location equipment and the projection maintenance, those would all come under that one supervisor.

Q. Have you given us practically all of the departments at this time? A. Yes.

636 Q. In a general way, what, in 1931-32 were your physical facilities, that is, to what extent did you use buildings and machinery? A. Well, our buildings—are they to include the stages on which we record?

Q. No. A. Well—

Special Master Auchincloss: Just give it in a general way, Mr. Shearer.

Mr. Schwartz: We understand, of course, that you have stages, I mean your own department by itself.

The Witness: Well, we had two buildings, one 30 feet wide and two stories high, 150 feet long; another building 80 feet wide and 120 feet long and two stories high. That building was especially con-

Douglas Graham Shearer—for Defendants—Direct.

structed with deep foundations to avoid vibration. The columns under the building go down 20 or 30 feet into a sand bed. It was very expensive production, so that our devices wouldn't be shaken by passing trucks. The equipment consists of 22 recording channels.

637

By Mr. Schwartz:

Q. What is a recording channel? A. A recording channel is a complete assembly of apparatus which extends from the microphone through the amplifier system right to the recording machine that lays the exposure onto the sound film.

638

Q. Is this as of 1932? A. This is, as nearly as I can tell, about what we had in 1932. We had about 75 microphones, 200 loudspeaker units, about 200 reproducing machines. It would be more than that then. It would be about 30. We have 79 now, and naturally many hundreds of jack plugs, connection plugs and amplifier switches.

Q. I wanted to get the larger equipment in a general way. A. Well, those things become large in their assemblage. There is no one particular item in the plant that looks like a large piece of apparatus. It is the combined assemblage of a lot of small things that make up the large units. We had the largest recording plant in the world. We still have. That includes the broadcasting plants of N. B. C., and any other studio or recording plant.

639

Q. Well, I think that covers the ground very well. Mr. Craig suggests—and perhaps he is right—we can have a little more in detail what a channel is. It didn't mean a thing to me when you first told me about a channel. A. The word "channel" is used because it describes the apparatus through which something can flow in one direction and arrive somewhere. It starts with the microphone. The microphone contains an amplifier.

Douglas Graham Shearer—for Defendants—Direct.

640 Q. The microphone may be on a stage? A. Yes. That amplifier is included in the microphone to raise the strength of the signal immediately before it has to travel any distance. The wires from the microphone are arranged to run to a control booth. In that control booth—

Q. That is also on the stage? A. It is adjacent to the stage. It usually overlooks the stage, or may be situated on the stage in the form of a booth or box on wheels that can be rolled in. That control booth contains dials, meters, a horn, loudspeaker, and another amplifier. That sound is reproduced directly from the microphone through this amplifier in the control booth, fed to the horn in the booth where the recording mixer can hear what the microphone is receiving, through the system, not directly from the set. From that booth the wire is run back to the recording plant where they go to further amplifiers which build them up in strength and distribute them after the proper connections have been made to their recording machine. Also, in connection with that channel, or as a part of the channel, is a power distributing system so that the motors of the camera and the recording machine will run in synchronism with each other. Those elements taken together make up what we call a channel.

Q. And, of course, includes all the necessary motors and batteries and amplifiers, and all the other apparatus necessary? A. Yes, certain auxiliary equipment such as batteries and power supply which, of course, is essentially a part of the channel.

Mr. Schwartz: That is all. Any further questions?

Mr. Driscoll: No.

(Witness excused.)

(Whereupon, at 12:00 o'clock noon, an adjournment was taken until 9:30 o'clock A. M., Monday, March 8, 1937.)

HEARING OF MARCH 8, 1937.

643

Special Master Auchincloss: Proceed, gentlemen.

WILLARD K. CRAIG, having been previously duly sworn, resumed the stand and further testified as follows:

Re direct examination by Mr. Hilborn (resumed):

Q. Mr. Craig, when you testified with reference to John Meehan, you said there was one item you wanted to check up. Will you please give us the detail with reference to Meehan? A. Yes, sir. There was one item of \$833.34 which was necessary to complete the total of \$23,333.34 charged to "Letty Lynton" in Meehan's time. The explanation is this, that on December 23rd, I testified that we paid Meehan \$666.67 for work on "Letty Lynton". That represents four days' salary. The facts of the case are, the scenario report showed that he worked six days in that week, but the week prior to the time that he started on "Letty Lynton", that is the week ending December 2nd, 1931, he was out of town two days and we did not get the notice of that two days' absence until the week of December 23rd. Having paid him the full week of December 2nd, we paid him only four days in the week of December 23rd to make up that time, and failed at the immediate time to make the correct charge, charging only four days to "Letty Lynton". That was corrected later by a journal entry. So that in the week of February 10th, we charged by journal entry, \$833.34, representing the adjustment of the two days that had not been charged in the week of December 23rd.

644

645

Q. So that the item in the Exhibit A in the amended accounting showing Meehan's salary is the correct amount paid to Mr. Meehan for services on "Letty Lynton"? A. That is correct.

Q. Now, will you also give us the apportionment of the Joan Crawford time? A. In my original testimony, I had a little difficulty in getting the days together at the moment.

Willard K. Craig for Defendants—Recalled—Re-direct.

- 646 I testified that Crawford started work on "Letty Lynton" on February 24th, 1932, and was closed on March 28th, 1932, which represented a lapse of time of four weeks and five days. However, on March 23rd, 1932, she made a retake on a prior picture No. 603, so that that one day was charged to the picture in which she was making the retake and not to "Letty Lynton", resulting in our having charged her four weeks and four days in the regular production of the picture at \$3000 a week, or \$14,000. Her rate changed on March 30th, 1932, to \$3500 a week. She made retakes on "Letty Lynton" on April 1st—no, pardon me—April 1st to April 4th inclusive, 1932, four days, and one day on April 12th, a total of five days retakes at \$3500 a week, resulting in a charge of \$2,916.68.
- 647

Mr. Driscoll: What was that figure?

The Witness: \$2,916.68. Crawford had finished work in production, 603, Grand Hotel on February 18th. She started on "Letty Lynton" on February 24th, 1932, resulting in four days between pictures at \$3000 a week, or \$2000, which was charged as an accumulation against "Letty Lynton", making the total charge of \$18,916.68 the correct charge as represented in the amended accounting.

- 648 Q. Mr. Craig, have you prepared a schedule of the shorts upon which work was done in the fiscal year 31-32? A. Yes, I have.

Mr. Hillborn: I think Mr. Driscoll has one of these (handing document to the Special Master).

Q. Can you tell us, Mr. Craig, how much money was spent by the Studio on shorts in the fiscal year 31-32? A. (Witness examines memorandum.) The shorts produced in 1932 cost a total of \$110,231.86.

Willard K. Craig—for Defendants—Recalled—Re-direct.

By Mr. Hillborn:

649

Q. In other words, the amount of money paid by the studio for the direct labor and the \$7000 which you testified to for overhead on the shorts in the fiscal year 31-32, was \$110,231.86?

Q. In order that we may put in the record the information that Mr. Driscoll asked last week, how many shorts were released in the fiscal year 31-32? A. There were eight shorts released during the fiscal year 31-32. That is, the fiscal year ending August 24, 1932.

Q. That is Trader Airedale, Olympic Events, Pearls & Devilfish, Sharks & Swordfish, Trout Fishing, Aquarium Short, Sea Elephants and Winter Sports? A. That is correct.

650

Q. Mr. Craig, what position did the shorts bear to the business of M-G-M in this fiscal year?

Mr. Driscoll: What does that mean? I don't understand that.

Mr. Hillborn: I think the answer will be clear.

Mr. Driscoll: Maybe we ought to have a question that we understand before we allow the answer to go in.

Q. What relation did shorts bear to features so far as the activity of the studio was concerned? A. Well, entirely secondary, more or less of a salvage nature to features, because we had the sets and equipment and personnel available that could be used in making shorts with very little expense. I think the best evidence is probably the fact that out of a total production cost of \$16,000,000, there was only \$110,000 spent on shorts.

651

Q. Do you know, Mr. Craig, what, if any, time of the executives, was used on shorts? A. Very little.

Q. Mr. Craig, can you tell us if the aggregate of the salaries paid to stars was picked up in succeeding produc-

Willard K. Craig—for Defendants—Recalled—Rê-direct.

552 tions in the same way as the salary of Crawford and Montgomery were picked up in this picture?

Mr. Driscoll: That is objected to as immaterial, having nothing to do with the issues.

Special Master Auchincloss: I don't see what that has to do with it.

653 Mr. Hillborn: Well, it has this to do, may the Court please: If Mr. Driscoll will claim that the time was improperly charged to the picture, then it is properly chargeable, we will claim, to studio overhead. Now, in the same way and in the same method of computation, what was charged to other pictures should be taken out of them and put into studio overhead. So far as we are concerned, what we desire to do is to have the fact in the record so that whatever method of computation is finally adopted, it may be similarly used for all productions.

Mr. Driscoll: We had testimony last week that it was carried over in the succeeding picture each time.

654 Mr. Hillborn: We have the picture that was carried over but we haven't the detail of the amount that was carried over. The only point is, we want the facts in the record so that whatever method of computing is finally reached, the fact will be in the record to be used in that computation.

Special Master Auchincloss: Go ahead, put it in.

The Witness: Will you please give me the question?

(Question was read by the reporter.)

Mr. Hillborn: In this fiscal year.

The Witness: Total of stars' salaries assigned to production in the fiscal year '32, and I use the word assigned to distinguish it from those salaries that

Willard K. Craig—for Defendants—Recalled—Re-direct.

are charged direct for working time, amounted to **655**
\$492,866.75.

Q. Now, Mr. Craig, can you tell us what a camera-day is? A. A camera-day is a term used for a shooting day, a day on which production is actually in the process of being photographed.

Q. Can you tell me how many camera-days there were used on "Letty Lynton"? A. 33 camera-days on "Letty Lynton".

Q. Mr. Craig, what was the practice of the studio with reference to charging overhead on the camera-day basis in the fiscal year 31-32? A. Our normal policy was to charge overhead to a feature production at the rate of \$1559 per camera-day. The exception to that, being those pictures made for Cosmopolitan, under whose contract we were required to charge only \$1250 per day or \$125 per hour for retakes, and further for shorts which were not charged on a camera-day basis for the fiscal year. **656**

Q. Was that a method adopted by the studio in an effort to absorb the studio overhead to the pictures?

Mr. Driscoll: Objected to, the particular purpose for which it was adopted. We are only concerned with the facts, and it was adopted.

Mr. Hillborn: We are entitled to show, I think, **657**
the basis, the reason for the studio's method of accounting.

The Witness: It was charged to the overhead.

Special Master Auchincloss: To cover the overhead.

Mr. Hillborn: And, can you tell us the aggregate amount which was charged to "Letty Lynton" for the 33 days? I think it is \$51,447.

A. \$51,447.

Willard K. Craig—for Defendants—Recalled—Re-direct.

664

Mr. Hillborn: All right.

Mr. Driscoll: That was evidently the overhead charge until this accounting. Then it was changed to \$136,000, is that it?

Mr. Hillborn: That isn't correct at all. I think that Mr. Craig can answer the question.

The Witness: The rate of \$1559 was predicated on the experience of several years prior to 1932. I do not recall just what year that was based on. The reason for not changing the overhead rate from year to year is that we endeavor, in order to control our studio costs, to have comparative costs, costs that will compare from year to year as closely as we can, and for that reason the rate of \$1559 per day has existed from the time it was established in '30 or '31, up to today, the same rate per day for our accounting, for our studio accounting purposes. The balance of the unabsorbed general studio overhead, including all the various departmental unabsorbed and overabsorbed, was transferred to New York at the end of the fiscal year and pro-rated to the pictures at that point.

665

Q. Did \$1559 per day ever absorb the total overhead of the studio and the New York overhead?

666

Mr. Driscoll: That is objected to. The facts will have to be proven without a conclusion of that sort.

Special Master Auchincloss: I think you ought to prove the facts out on that. Mr. Craig's answer, as I understand it, was that that amount was charged through their experience in the matter, but is there any other basis for it than that?

The Witness: Well, do you mean for the amount of the daily charge, for the reason of using a camera-day basis?

Willard K. Craig—for Defendants—Recalled—Re-direct.

Special Master Auchincloss: No, the amount of the daily charge. 667

The Witness: Well, that was the experience in one year, as I say. I can't say offhand what year it was. It was a year, I think, either in '29, '30 or '31, and has been retained for studio purposes for the basis of comparative costs from year to year on pictures.

Mr. Driscoll: What time did you say it started?

The Witness: I can't tell you. I can't testify to the exact year; but, as I recall, it was after the advent of sound which was in '28. It was either '29, '30 or '31. 668

Mr. Hilborn: You can get the exact date, can't you, Mr. Craig?

A. I can get the date.

Q. Will you get it for us? A. All right.

By Mr. Hilborn:

Q. Mr. Craig, have you prepared a computation which shows the amount paid for manufacturing costs on all the pictures in the fiscal year 31-32? A. I have.

Q. And does that statement include the number of camera-days on each picture for that fiscal year 31-32? 669

A. The statement includes all the camera-days on feature pictures for that year, yes, sir.

Q. And does it also include as to each picture, the number of studio camera-days at \$1559 per day? A. Yes, sir, with the exception of Cosmopolitan.

Q. Will you explain the schedule, then, Mr. Craig?

Mr. Driscoll: Have you copies of this that we can follow?

Mr. Hilborn: Yes.

Colloquy of Counsel.

658

Special Master Auchincloss: For my information, where does that come into this, or what figures on this accounting (indicating)?

Mr. Hillborn: That does not appear on the amended accounting because it did not, as will appear from the evidence, absorb all of the overhead and the amended accounting as submitted was an absorption of all the overhead and distributed among all the pictures.

Special Master Auchincloss: I don't quite get that.

659

Mr. Driscoll: It is something that isn't in the amended accounting at all.

Mr. Hillborn: This figure of \$51,447, does not appear on the account for this reason, the figure \$1,559 charged per camera-day was not sufficient to absorb the total overhead of the studio in the fiscal year. So, the figure that has been placed upon the account was a figure of \$136,000 for this picture, which would absorb its share of the total overhead. (In Defendants' Exhibit 18-D5 this figure is \$163,649.29.)

Mr. Driscoll: Well, you propose to charge this in addition to the figures \$136,000?

Mr. Hillborn: No, the figure \$51,000 is included in the figure \$136,000.

660

Mr. Driscoll: Well, then, why do you prove it here? What has it got to do with the account? You say it is not in the amended account. Where does it come into this situation?

Special Master Auchincloss: It is, in a sense, in the amended account, since he says it is included in the figure \$136,000.

Mr. Driscoll: That figure \$136,000 is a fractional part of the overhead that they are trying to charge to "Letty Lynton".

Special Master Auchincloss: Yes.

Willard K. Craig—for Defendants—Recalled.—Re-direct.

Mr. Driscoll: But he says actual overhead 661
charged by custom would be \$15. per camera-day,
and therefore for 33 days "Letty Lynton" ought to
be charged \$51,447 instead of \$136,000. I assume
that is his argument.

Mr. Hillborn: No.

Mr. Driscoll: Of course, that is his object. I
shouldn't say very much. I should let him go on
and argue.

Mr. Cohen: That is not it.

Special Master Auchincloss: Let him argue it
later. All we are trying to do now is get the facts.
I think you have put it in. Now you can explain
it to me. Just exactly what does it represent? 662

Mr. Hillborn: The figure \$1559 did not cover,
was not intended to cover in the first place, the
items which appear upon this account on page 5 (De-
fendants' Exhibit 18-D5) addition to reserve for con-
tinuities, salaries paid by New York, unabsorbed
studio depreciation and interest paid, it wasn't con-
templated that it would include those items. It was
an effort to absorb all of the \$2,246,793.28 into the
feature pictures which were produced during the
fiscal year. It didn't absorb it completely. Is that
correct, Mr. Craig?

The Witness: That is true. 663

Mr. Hillborn: So that the figure of \$136,000 which
is included in this account, includes, among other
things, the figure \$51,447 which was charged for the
33 camera-days, the items which were not intended
to be included and the unabsorbed studio overhead
which was not included in the 33 camera-days at
\$1559.

Special Master Auchincloss: Well, in order that
we may have all the facts before us, would you mind
asking him a few questions as to how they deter-
mined the amount to be charged per camera-day?

Willard K. Craig—for Defendants—Recalled—Re-direct.

670

Special Master Auchincloss: Do I understand that these are offered as exhibits or not?

Mr. Driscoll: Not yet they haven't, but he is testifying from the schedule so I thought it would be only fair that we look at them to see what it is all about.

Mr. Hilborn: We will put them in.

Mr. Driscoll: You are marking the short schedule in evidence?

(The instrument in question was marked Defendants' Exhibit C-24.)

671

Mr. Hilborn: The Exhibit C-24, may it please the Court, with a caption 1932, means the fiscal year ending in August '32, and '31 means the fiscal year ending in August, '31.

Mr. Driscoll: Is this being offered in evidence (indicating)?

Mr. Hilborn: Yes.

(The instrument in question was marked Defendants' Exhibit C-25.)

The Witness: I am ready, Mr. Hilborn.

672

Mr. Hilborn: Will you explain the schedule, Mr. Craig, please?

Mr. Schwartz: That is Exhibit C-25 that he is talking about.

The Witness: This schedule submitted as Exhibit C-25, represents the feature productions which were worked on during the fiscal year ending August 24th, 1932, listing each of those feature pictures by name, showing the costs that had accrued at the end of the prior fiscal year, that is, August 26th, 1931, the number of camera-days that those productions had been worked on in the fiscal year ending August

Willard K. Craig—for Defendants—Recalled—Re-direct.

26th, 1931, and the second column shows the increase in production costs for the fiscal year ending August 24th, 1932, with the additional camera-days and hours in the case of Cosmopolitan Productions, which had accrued during the fiscal year 1932. Will you read that answer as far as I have gone?

673

(Desired testimony was read by the reporter.)

The Witness: Thank you. The following column shows the total days and hours to entirely complete production and the final costs to complete production. There is also a column showing the three pictures which were rejected at a later date and the last two columns on the schedule show the periods that the work in 1932 represents to the final, completed costs, or rather in the first column the percentage is based on the days in 1932 to the total days. In the second column the percentage is the 1932 costs as to the complete final costs of the picture.

674

By Mr. Hilborn:

Q. Now, Mr. Craig, referring to "Letty Lynton" on this picture 611, the figure of \$316,139.48 appears. What does it represent, Mr. Craig? A. Well, that represents, the figure \$316,139.48 represents the costs that accrued during the fiscal year 1932 on "Letty Lynton". There were evidently some straggling charges amounting to some fifty odd dollars that went into finally complete the picture, but for our purposes here, we consider the picture here as 100% completed in the fiscal year ending August 24th, 1932.

675

Q. Now, Mr. Craig, that includes the figures which are on the amended account beginning with the item of \$75,573.42 appearing on Page 1, down to and including the item of \$36,849.55 on Page 4, plus the \$51,447 for the 33 camera-days at \$1559 a day? A. That is correct.

Willard K. Craig—for Defendants—Recalled—Re-direct.

676 Q. And does not include any portion of the New York overhead or of the unabsorbed studio overhead? A. No, it does not include any of that.

Q. Now, in addition to the cost for the feature pictures you have shown on Page 2 of the Exhibit C-25, the cost of the foreign versions and other items. Will you explain those other items, Mr. Craig? A. The cost of the foreign versions amounts to \$734,585.45 which represents all studio costs and foreign versions worked on in that particular fiscal year or fiscal year ending August 24th, 1932.

Special Master Auchincloss: Let's keep that foreign stuff out. Let's keep it separate.

677 The Witness: May I complete this? I want to tie my total figure here up to my total manufacturing costs. It is merely a reconciliation.

Special Master Auchincloss: Yes.

678 The Witness: Frequently before we started the actual production and consider a picture in production, we have charges that accrue from many different sources. We refer to them as suspense production. So we have an item cost of suspense production, \$308,796.96. The cost of pictures completed in prior years, \$59,267.71. Costs of shorts as listed in the schedule immediately preceding this exhibit, \$110,231.86. The total production costs for the fiscal year ending August 24th, 1932, \$16,204,197.54.

By Mr. Hilborn:

Q. Mr. Craig, I want to be sure of one thing. This Exhibit C-25 contains an item of 299 $\frac{1}{2}$ hours. Those were hours on Cosmopolitan Pictures, were they? A. That is correct.

Q. And charged to Cosmopolitan at what rate? A. \$125 per hour.

Q. Does this show how many Cosmopolitan pictures were

Willard K. Craig—for Defendants—Recalled—Re-cross.

worked on in the fiscal year? A. No, this does not exactly. I will have to verify that. I can say this, that all of the pictures on which hours are shown here in this fiscal year 1932 were Cosmopolitan pictures, but it is just possible that we did a Cosmo picture on which there were no retakes, in which case, the hours wouldn't show.

Q. There are six here. A. Let me verify that, if you will.

Q. Mr. Craig. A. Yes, sir.

Q. On this Exhibit C-25, the first group of pictures ending with freaks were pictures which were begun in '31, the fiscal year ending August 26, '31, and completed in the fiscal year ending August 24, '32?

Mr. Driscoll: And some others down below.

Mr. Hilborn: And some few below.

The Witness: Yes, sir. I would say this, I think you will find on some of those pictures that we had probably had work done in '31 and we had more work done in '32 and we may have had work done subsequent to that time.

Q. In other words, this schedule shows the work done in '31 on certain pictures which were finished in '32 and the work done in '32 on pictures which were completed in '33? A. Yes, sir.

Q. Also pictures which were begun and completed in '32? A. That is correct.

Q. In other words, it shows every picture on which any work was done in '32? A. Yes, sir. This shows in detail every feature picture on which any work was done in '32.

Re-cross examination by Mr. Driscoll (resumed):

Q. Mr. Craig, in accordance with Schedule C-25, the final cost of "Letty Lynton", including overhead, in so far

MICRO CARD

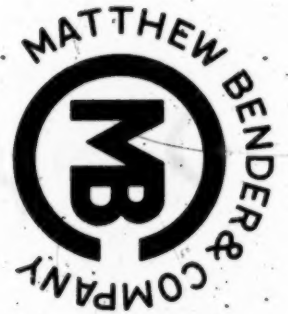
TRADE

MARK



22

39



1410

2

65



Willard K. Craig—for Defendants—Recalled—Re-cross.

682 as you are concerned and your books are concerned, is \$316,122.23? A. That is correct.

Q. And when you sent your cost to the home office in New York City, you charge against each one of these pictures overhead, general overhead at camera-day cost of \$1559 for each picture? A. That is correct.

Q. And if that is not sufficient to absorb the overhead, the rest is charged to profit and loss, isn't it? In other words, you consider it as a losing operation? A. That is something I can't testify to.

683 Q. Well, isn't that the nature of your report? When you charge \$1559 a camera-day against a picture and you have left unabsorbed overhead, that unabsorbed overhead is referred to the home office in the nature of profit and loss? A. No.

Q. How is it then reported to the home office? A. I charged it to the home office the same as I would a negative cost.

Q. You charged it and say nothing about it and let them classify it as they will, is that correct? A. That is correct. They handle the consolidated books of the corporation.

Q. But as a matter of accountancy, it is profit and loss, it is loss, isn't it, and it is charged to the account which ordinarily is known as profit and loss? A. That, I couldn't say, because I don't have the profit and loss accounts. I 684 don't make the charge.

Q. Well, Mr. Craig, when you take a certain fixed overhead and your overhead does not absorb the cost, then there is an item left that is loss, isn't there? A. I don't think you can interpret it that way any more than you can interpret the loss that we charged into the picture.

Q. Let me say it this way, then: That item must be recovered out of the general surplus of the company? A. That is a matter I don't think I am qualified to testify to, because I am not speaking in generalities and I don't think I should be expected to.

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. Well, I am asking you as an accountant. You are an accountant and you certainly know, Mr. Craig, whether as an accountancy proposition, that is not charged to the general surplus of the company. 685

By Mr. Driscoll:

Q. In this case, Mr. Craig, there isn't any question as to what was done, is there? Isn't it a fact that you did charge on your books, overhead to this picture at the rate of \$1559 a camera-day? A. That is correct.

Q. That was what was done, isn't it, Mr. Craig? A. That was what was done.

Q. And you understand it and I understand it, don't we, Mr. Craig? 686

Mr. Schwartz: So do I.

The Witness: Yes.

By Mr. Driscoll:

Q. Now, then, coming back to our original proposition, our original question that Mr. Schwartz is confusing because we don't know what was done in this case, coming back to that proposition, when you charged \$1559 a camera-day to this picture and that leaves unabsorbed overhead, isn't it a matter of fact and a matter of bookkeeping that that unabsorbed item is charged to the general surplus of the company? A. No, sir. 687

Q. It is not? A. To the best of my knowledge, it isn't charged to the surplus.

Q. Then, where did you get the money to pay it? A. That is the reason I hesitate to testify in this case because I have to testify from hearsay and from second-hand knowledge.

Q. As a matter of accountancy, where did you get the money to pay it? It has to be paid, doesn't it? A. Naturally it has to be paid.

Willard K. Craig—for Defendants—Recalled—Re-cross.

688 By Mr. Driscoll:

Q. It has got to come out either of your operation or it has to come out of your surplus, hasn't it, or your capital?

Mr. Schwartz: Now, we object to the question on the ground that it calls for a conclusion of the witness and for hearsay testimony, he having testified that he has nothing to do with that feature of this accounting. It goes to New York. He doesn't pay it or doesn't account for its payment.

(Discussion was had off the record.)

689

Mr. Schwartz: I accept the amended suggestion to me by one of my associates and object upon the ground that he has testified he doesn't determine out of what fund it is paid or how it is paid and his books don't show it. He keeps no bookkeeping account of it, so that that would obviously be hearsay.

690

Special Master Auchincloss: Well, Mr. Craig—as I understand Mr. Craig's position here, he is in charge of the production, the accounts relative to the production end of this business. He is also an expert accountant. Now, all Mr. Driscoll is trying to find out—I don't think he ought to go into hypothetical questions as to how corporate losses are charged or one thing or another like that necessarily—but I think he can bring out all the facts as to what he does. So far as I can see, Mr. Craig has got a loss here according to his way of operations that he charged against New York.

By Mr. Driscoll:

Q. Well, as a matter of fact, you haven't any loss here, have you, Mr. Craig? A. I have no profit and loss accounts at all. I don't consider it as such. This is merely a manufacturing account.

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. The overhead that you put on each one of these pictures was sufficient—the charges you made against each individual picture for overhead were sufficient to absorb the overhead in so far as you were concerned? A. No, that was not the intention. 691

Q. What did you have left over? A. We have in our general overhead for the fiscal year 1932—

Q. Yes. A. —we have some \$787,498.48 left over of our general overhead.

Q. Where does that appear? A. It does not appear.

Q. What is the amount again? A. It is a part of that figure of \$2,000,000.

Q. Let's get the figure first. 692

(Desired testimony was read by the reporter.)

The Witness: That is merely the figure for the general overhead. It does not include all the departmental overhead, on absorbed overhead or the stock company operation.

Q. Well, first let's take C-25. You mean that that figure of \$787,000 odd dollars is not included in this total cost that you have set forth in C-25? A. No, it is not.

Q. It is not included there at all? A. No, sir.

Q. That is a separate item? A. It is a part of the \$2,246,793.28. 693

Q. You say it is a part of what item? Let me have that again. A. On page 5 of the amended accounting you have the studio overhead detail and schedule A annexed hereto, \$2,246,793.24 (Defendants' Exhibits 18-D 5, 18-E 1, and 18-E 2).

Q. And that is made up of this detail that appears in Schedule A, pages 1 and 2? (18-E 1 and 18-E 2.) A. That is right.

Q. The \$2,000,000? A. If I understand your question, originally you were trying to find out what portion of our

Willard K. Craig—for Defendants—Recalled—Re-cross.

694 general studio overhead was not absorbed by our \$1559 a day?

Q. That is right. A. We have a certain group of overhead accounts that we call General Studio Overhead, which we credit the \$1559 a day to charge the pictures.

Q. Yes. A. We have certain other accounts that are departmental operations to which I have already testified that they are absorbed on a percentage basis or other varied bases that we have discussed here. We have over and under absorbed in those cases. That is not a part of the general figure that I gave you of \$787,000.

Q. Now, let's see a little further. On this camera-day overhead of \$1559, you made no such charge against any of the shorts except two, was it? A. Yes, there were two shorts.

Q. Two shorts. Which ones of the list that appears on C-24, did you make a charge for overhead against? A. Would you mind letting me answer that question later? I have it some place, but I can't put my finger on it. I have so many papers here.

Q. You said that you released eight shorts during that fiscal year. How many shorts did you distribute during that fiscal year, if you know? When I say you, I mean the Metro Company, pardon me. A. I don't know.

Q. Did you know that they distributed 90 shorts in 1931 calendar year and 143 shorts in 1932 calendar year? A. Well, I didn't know the exact number, but I know that we bought and we made or had-made outside of the studio many other shorts than the ones that I have shown here. I have submitted only the shorts that were worked on in the studio in Culver City.

Q. And you charged overhead against two of them? A. That is correct.

Q. And those you are going to look up for us? A. I will give you those two. I can't do it offhand.

Q. Let's turn then to Exhibit C-1, the camera depart-

Willard K. Craig—for Defendants—Recalled—Re-cross.

ment overhead. You have that statement, haven't you? 697

A. I will have it in just a minute. Yes, I have it here.

Q. Take the amount allocated to "Letty Lynton" \$1,045.17, I think. A. That is correct.

Q. And that was on a basis of 25% of the direct labor that was charged to "Letty Lynton"? A. That is right.

Q. Now, then, in addition to that 25% that was charged to "Letty Lynton" for camera department and for the other items as we will come to them, there was this charge of general overhead of \$1559 per camera-day? A. That is correct.

Q. Now, this charge of 25% of direct labor that you made to "Letty Lynton", I assume, was exactly the same charge that you made to each and every other picture that the studio was working on during that fiscal year? A. Every other feature picture, yes. 698

Q. Every other feature picture. In other words, no matter whether it was Grand Hotel or whether it was something else, the camera department made an overhead charge, departmental overhead charge to that picture of 25% of the direct labor? A. That is right.

Q. And those were picked up each week? A. That is correct.

Q. So that that overhead applied to all pictures worked on by the studio during the fiscal year, regardless of whether or not they were released that year? A. That is correct. 699

Q. Your method of bookkeeping enabled you to pick it up from week to week and charge it in that manner? A. Usually, yes. It was usually a week later, a week to week basis.

Q. So that with the camera department, we have that 25% charge and of course the amount of the charges differed with each picture? A. That is correct.

Q. Because there are no two pictures that cost exactly the same, that is impossible, isn't it? A. Yes.

Willard K. Craig—for Defendants—Recalled—Re-cross.

700

Q. It is based on that percentage basis and the amount of the charge varies? A. That is right.

Q. Now, then, we have on C-2 the break down of the overhead of the editorial department, and there again that is 8% of the labor cost? A. That is right.

Q. And in that same manner you make that same charge against labor costs for each of the other pictures that were worked on in the studio in that fiscal year? A. That is correct.

Q. Picking it up from week to week, you were generally a week later, but every week it is picked up? A. That is right.

701

Q. Now, in the camera department, there is an unabsorbed item left after the departmental cost was charged to the picture? A. That is right.

Q. And that is reflected in Schedule A-2 (18-E 2) of the amended account? A. Yes, sir.

Q. And that is in there in addition to this \$1559 a camera day that was charged to the picture? A. Yes; the 25% of the camera direct salaries in addition to the \$1559 a day.

Q. Let's put it this way: Isn't this the situation, Mr. Craig, actually, the \$1559 per camera day per picture is not reflected at all in this amended accounting? A. That is true.

702

Q. But you have adopted in this amended account or whoever made up the amended account, I don't accuse you of it, I don't think you would do this—in this amended account, an entirely different system was used, isn't that right, Mr. Craig? A. Yes. It differs from our studio procedure.

Special Master Auchincloss: Well, so that I may understand, may I ask a question? I understand that that \$1559 does not appear in the unabsorbed overhead of the camera department?

Willard K. Craig—for Defendants—Recalled—Re-cross.

Mr. Driscoll: That is correct.

703

The Witness: That is right, yes. We have a certain group of accounts that we refer to as our general overhead accounts. They consist of the executives' salaries, the accounting department salaries, the production office salaries, the maintenance and facilities around the studio, the repairs and maintenance of buildings. That is the account under which we try to absorb or which we charge the studio on the basis of \$1559 per day. Now, the individual departments endeavor to distribute those overheads on the basis of the direct labor as contributed to the various productions.

704

Mr. Driscoll: And then, after you have done that, after you have charged on the basis of \$1559 per camera day against the picture and charged your departmental overhead on a percentage basis and picked up your unabsorbed departmental overhead, you put the whole thing together and you have a cost against Letty Lynton of \$316,000 plus, or whatever it was, that is right, isn't it?

A. That is right, \$316,000.

Q. Now, the amended account didn't use that method at all. They ignored the charge of \$1559 per camera day and set it up by first making the departmental overhead charges against the individual picture, throwing the unabsorbed part into the summary account which appears here as A-2 (18-E-2) and then throwing in these other items that they say are justifiable overhead, and dividing it all up in 44 parts. That is what they did, isn't it?

705

A. That is right.

Q. Now, the editorial department overhead is on the basis of 8% of labor? A. That is correct.

Q. Then, we have C-3, the scenario department and there it is 12%. The overhead is charged, the departmental

Willard K. Craig—for Defendants—Recalled—Re-cross.

706 overhead is charged to the individual picture on the basis of 12% of the writers' compensation, is that right? A. That is correct.

Q. And that is done, that was done by each picture worked on by the studio during that fiscal year? A. That is correct.

Q. So the amount of the charge would depend upon the proportion of labor. A picture that had more time used of writers would have a larger charge for departmental overhead? A. Commensurate with salaries.

Q. Commensurate with salaries; that is correct, isn't it? A. Yes.

707 Q. Now, then, we come to wardrobe, and there it is a charge of \$2500 fixed by Mr. Rapf. It has nothing to do with labor or material. That is, it is fixed by Mr. Rapf. Let's leave it that way. A. Yes.

Q. It has nothing to do with labor and material. I will let it stand that way rather than start an argument. It is a charge of \$2500 fixed by Mr. Rapf? A. Yes, sir.

Q. That is C-4. Then we have C-5. That is the mechanical department, lighting, and there the overhead is on the basis of 8% of direct labor? A. That is right.

Q. Then we come to the publicity department, and there it is done on a somewhat different basis. You take the number of pictures that are in shooting and you charge 70% of the overhead against those pictures that are in shooting and you split up that figure, whatever it might be, in accordance with the number of pictures. Here it is a numerical proposition instead of a cost proposition, is that right? A. That is correct.

708 Q. Up to this point it has all been cost, a cost basis of apportioning your overhead except in the case of Mr. Rapf. The others have all been cost, and the same percentage for each picture? A. That is correct.

Q. And in this case it is a numerical proposition, splitting it up among the number of pictures that were in

Willard K. Craig—for Defendants—Recalled—Re-cross.

shooting and among the number of pictures that were in preparation? A. Yes. The basis is that we estimate that 70% of the publicity department salaries and expense is devoted to productions in process. 30% is devoted to productions in preparation or subsequent to production. 709

Q. So that if two pictures like Letty Lynton which had a final cost of \$316,000, and Prosperity, which had a final cost of \$625,000, pretty nearly twice as much, which were in shooting at the same time, although one was a picture that ultimately cost twice as much as the other, yet they contribute equally to this publicity department overhead?

Mr. Hilborn: I think that question contains an assumption which is contrary to fact. 710

Mr. Driscoll: What is the contrary to fact?

Mr. Hilborn: That the shooting time of both pictures is identical because Mr. Craig has testified that they were charged 70% of the publicity on the shooting time, not per picture.

Mr. Driscoll: Well, refine the question then, to that extent, Mr. Craig, every week that there are charges against both pictures, it would be for the same amount, wouldn't it?

A. If they were shooting in the same week, both of them shooting the same week, they would have the same charge, but that is not telling the whole story, because your element of time comes in. You had 89 shooting days on Prosperity. You have 33 on Letty Lynton. 711

Q. Yes. A. So Prosperity probably took more than twice as much publicity charges as did Letty Lynton. You must look at the completed column of days there in order to get your comparison. It happened that in the fiscal year 1932, you had 33 and 38. The final answer is 33 and 89.

Q. All right. Now, then, as a matter of fact, Letty Lynton had 33 days and had a final cost of \$316,000.

Willard K. Craig—for Defendants—Recalled—Re-cross.

748 versions. On the French versions we charged \$375 per version for the foreign supervision, foreign assistance.

Q. \$375? A. Yes, per version. On the German we charged \$750 per version.

Q. It cost more to be a German? A. It cost more to make the German pictures.

Q. Now, the \$1500 allocation doesn't appear in this amended account of Metro. It appears in the Culver account. That is correct, isn't it, cost of foreign versions, just to keep the record straight? A. I believe I am to produce in evidence the foreign version costs that were accrued at the studio.

749 Mr. Hilborn: We haven't put that in yet, Mr. Driscoll.

Mr. Driscoll: Does this \$1500 item appear in this amended account of the Metro in any place?

Mr. Hilborn: No.

The Witness: I believe that appears in the Culver account.

Mr. Driscoll: It appears in the Culver accounting, that is exactly what I said, and the \$500, does that appear in the amended accounting of Metro or does it appear in the Culver?

750 The Witness: Mr. Driscoll, may I amend that statement a little bit. In Schedule A, page 2 of your amended accounting in the last item is foreign department overhead (unabsorbed), \$17,173.36 (18-E 2).

Q. That is right. A. Now, the charges which resulted in the absorption of this foreign department overhead, are represented in the Culver accounting.

Q. Yes. That is what I wanted to put on the record. The absorption is in the Culver accounting. The unabsorbed portion of \$17,173.36 is the last item in this Metro account. A. That is right.

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. Now, so much for that. That makes that clear, I think. The supervision also appears in the Culver accounting, doesn't it? A. Yes, sir. 751

Q. Under the head of direction? A. Under the head of miscellaneous production assistance.

Q. Miscellaneous production assistance, \$750, I see. A. You will see in the French version there is \$375.

Q. Yes. A. It is on page 2, second item.

Q. Yes. That clears that up fairly well, Mr. Craig. Then, on this account I won't ask you that just now. On this C-25 that you have offered into evidence, you have the names and titles, or the numbers and titles of all the pictures that were worked on, on the lot, during the fiscal year? A. With the exception of those items which appear as in summarized form at the end of the Schedule, yes, sir. The end of the Schedule, cost of foreign versions, cost of suspense productions, cost of pictures completed in prior years and cost of shorts. 752

Q. Well, perhaps I would be more accurate if I said there is a list of feature pictures worked on, all of the feature pictures. A. Which were in actual production during the fiscal year 1932.

Q. And they were 56 in number? A. I frankly haven't counted them, I don't know.

Q. I think that is correct. My figures are subject to correction by Mr. Schwartz, Mr. Hilborn, Mr. Pollak and Mr. Cohen. A. I will count them if you wish. 753

Mr. Schwartz: Jointly and severally.

Mr. Driscoll: Yes, jointly and severally. I will say there are 56 in number. Now, then, those 56 productions, for instance, the first of the list, I presume, are the ones that were already—in fact it is demonstrated right here on the statement C-25—for instance, 553, 561, 569, 570 and all of those immediately following down to 598, were the pictures

Willard K. Craig—for Defendants—Recalled—Re-cross

for 100 hours, would pay twice as much as a picture that used facilities for 50 hours? A. That is correct.

Q. It is proportioned with the amount of time that the picture used the facilities? A. That is right.

Q. And is not based on labor, it corresponds with a charge which is a percentage of the direct charge of labor? A. Yes.

Q. It is not just merely a numerical division of the overhead? A. That is right.

Q. That is C-13. Then we have C-14. We have there absorbed in the cost, \$91,944.15. I wish you would turn to the amended account and show me just where that is reflected in this account. A. Well, it is on page 2. I don't know whether my accounts are numbered the same. The sheet is headed Schedule A continued, Studio overhead, and it is the third item in the credit column, \$14,287.16 (18-E 2).

Q. Yes. That is the over absorption. That isn't what I am referring to. I am referring to the part that was absorbed, the \$91,900. A. Pardon me.

Q. What? A. That \$91,000 is absorbed in the pictures and in the various departmental expenses.

Q. Well, where is it reflected in this account as a charge against this picture? Where does it come in? A. You are looking at the detailed classification of the account now.

Q. Yes, the amended account. How does it come in there? I know how the over absorption comes in, but I don't know how \$91,944.15 comes in. A. At the head of page 3 in the "Letty Lynton" accounting you have automobile and truck hire, company equipment, \$372.49 (Exhibit 18-D 3). That is "Letty Lynton's" portion of this \$91,000.

Q. The company equipment, then, is the "Letty Lynton" portion of the departmental overhead of the automotive department? A. No, this distribution is made on the basis

Willard K. Craig—for Defendants—Recalled—Recross.

of the use of cars, company equipment. We charge them out on an hourly rate. "Letty Lynton" used automobiles amounting to \$372.49 from our company equipment. 721

Q. So a record is kept of the use of the facilities by the particular picture, and the particular picture is charged accordingly? A. That is correct.

Q. So it depends upon the amount of labor again, or a proportion of the amount of labor or facilities? A. That is right.

Q. Used by the particular picture? And a similar charge was made against every other picture worked on during the fiscal year? A. That is right.

Q. And those charges altogether amounted to \$91,944.15, which gave an over absorbed item of \$14,287.16? A. That is right. 722

Q. Now, the negative development you have already testified to there, I think. In that particular instance the account makes a footage charge and the profit is carried over into the A-2 statement? A. That is right.

Q. So that the charge against the individual picture is on a footage basis which corresponds to the use of facilities basis. It is not a numerical basis like the publicity department, for instance? A. Well, it is based on what we commonly call a commercial basis, on a footage basis.

Q. It is the relative amount of work done? A. Yes, sir. 723

Q. For each picture? A. Yes, sir.

Q. And a similar charge is made against each picture? A. That is right.

Q. And the amount of those charges, of course, vary with each picture? A. That is right.

Q. Because it depends entirely upon the footage for each picture? A. That is right.

Q. Then, if there is a profit it is carried over into this A-2 account. That happens to be a profit here? A. Yes, sir.

Willard K. Craig—for Defendants—Recalled—Re-cross.

24 Q. Now, your still department is C-15, Mr. Craig. Now, there you have an item absorbed into costs of \$50,442.35. Where does that appear in the amended account? Where is it reflected in the amended account? A. Absorbed into costs, \$70,442.35—certainly.

Q. Well, there is something wrong then.

Mr. Hilborn: No, there isn't, Mr. Driscoll.

Mr. Driscoll: Now you have it unabsorbed \$20,000.

25 A. Let me explain that. Your total costs of your still department are \$52,300.34. That is correct according to your statement?

Q. Yes. A. We had a credit from outside sales of \$2,431.47.

Q. Yes. A. We had credits from work done for our own productions, publicity department and so forth, \$70,442.35, our total credit.

Q. Wait a minute, now. A. The total credit includes the cash sales and the charges \$72,873.82.

Q. I see. A. Minus your \$52,000 cost, which leaves you an over absorbed item of \$20,573.48.

Q. Then it was right in the first place? A. Yes.

Q. Well, why did you make us change that first? A. I'm sorry, I don't know.

26 Q. Then, we come back, Mr. Craig, to this absorption into the costs of \$70,442.35. Now, I want to know for my own information as well as the Court's, where that is reflected in this amended account? A. On page 3 of your "Letty Lynton" accounting, down to about the fifth or sixth item from the bottom of the page, you have an item headed stills.

Q. Yes. A. Salary of a still man.

Q. Yes. A. And the second item is number of stills, \$709.62.

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. On what basis is that charge of \$709.62 made? A. It is based on the number of stills at various prices for various priced stills. 727

Q. The \$709.62 is part of this \$70,442.35? A. That is right.

Q. The \$444.31 is not part of the \$70,000? A. That is a direct charge for the still man.

Q. A direct salary, so that the basis of apportioning this \$70,442.35 is in proportion to the service that has been rendered, that is, service and material, we will call it, to each picture? A. Yes, sir.

Q. And that particular method of apportioning that overhead is in keeping with the apportionment of the other overheads of the other departments that we have thus far examined, with the exception of wardrobe and publicity, based on service, labor or material? A. Based on service, on measured service of some nature. 728

Q. Yes. Now, then, we come to the precision machine shop. That is C-17. We have absorbed into cost there an item of \$9,287.81. Where does that reflect itself in the amended account? A. The basis on which the precision machine shop overhead was spread, was as follows: That machine shop is a precision machine shop as you have seen it used or have seen the results in the laboratory, in the sound department and in the camera department. We charge 35% of the weekly precision machine shop work to the camera department. We charge 50% to the laboratory and we charge 15% to the sound department. That is the approximate use of the various departments, the use which they make on the precision machine shop. That will appear as an item in those various departmental accounts. It is an item that follows through. 729

Q. Well, now, let me see, the \$9,287.81; then, in so far as this amended account is concerned, is reflected in what particular item? I want to see. A. Well, it will be part of your—

• Willard K. Craig—for Defendants—Recalled—Re-cross.

736

Q. We will come back to Newcombe. Now, we come to C-21, print shop. There is an absorbed item of overhead there, departmental overhead of \$5,930.14. Is that the other material on Newcombe? A. I was going to look at that.

Q. All right. Where is that reflected in this (indicating)?

A. On the print shop?

Q. Yes. A. We maintained our own print shop at that time, and if the accounting department had forms printed, they were charged on material and time basis, or if we charged them into our printing and stationery account, which was done largely, and this is the cost of operating the department and the costs that were charged out for work done.

737

Q. This is a cost charged to the various departments, is that it? A. Department or stores account.

Q. It is not a direct charge then, no part of that? A. Very little of it would be a direct charge to pictures unless we would have an insert printed on a hand bill or something like that. It would be a very small amount. Most of it is represented in work done for office supplies, forms and things of that nature.

Q. And the charge is made on the basis of time, labor and material? A. That is right.

Q. All right. Let's turn to C-22. That is the salvage yard. That is not reflected against in the summarization, I presume, in the amended account? A. No, sir. That is salvage material that is sold. None of that is charged back to pictures because we do not charge our salvage back to pictures.

738

Q. The advertising department, C-23, you had an absorbed item there of \$29,062.56. Where is that reflected? A. That is charged directly to New York.

Q. To New York? A. Yes, on the pictures worked on.

Q. And if it appears in this amended account, you don't know where it appears, is that it? A. I could only assume

Willard K. Craig—for Defendants—Recalled—Re-cross.

where it might appear. You have on the first sheet an advertising direct charge.

739

Q. The first sheet of the amended account, advertising, direct charge of \$24,301.72, is that correct? A. Yes. I can only assume what is in that, though, because it might be that the amount we charged would be in that.

Q. Did you attempt to allocate this \$29,062.56 that appears on C-23, to the individual pictures? A. Yes, we did.

Q. You allocated it and referred it to New York, is that it? A. Yes, sir.

Q. On what basis did you allocate it? A. It was the basis of direct charges in all cases where we could.

Q. Shall we mark that to come back to it, too? A. Just a minute. I think maybe I can give you the answer here. I am sorry, Mr. Driscoll. We had better pass that up and I will get you the exact figures on it.

740

Q. All right, then, we will pass that for the present and come back to it. A. Yes. May we go back to the Newcombe department?

Q. Yes. That is Schedule C-20. A. C-20.

Q. Yes, and it appears on the amended account on page 3, item under special shots. A. I don't know how I can explain this very much better than I did before. This journal shows the people who were working in the department during the week. This particular journal shows 98% of the week's charges was to Picture 606 and 2% to No. 611.

741

Mr. Hilborn: It also shows, Mr. Craig, what was done on the picture that week?

The Witness: Yes. That was based on the following reports: 2 shots to Wood's production 606, 98%; 1 shot to Brown production, 611, 2%. Naturally the nature of the shot has a great deal to do with the percentage that it is based on.

Mr. Driscoll: Well, is it fair to say, then, that this allocation of this item of \$49,575.44 was the

Willard K. Craig—for Defendants—Recalled—Re-cross.

742 amount of labor and material devoted by that department to the particular picture?

A. Yes, that is correct.

Q. That is, what Newcombe tried to do, was to allocate the overhead for the week between the various pictures he was working on? A. Because there is no basis on which he could actually measure the time or expense. He had to estimate it.

Q. So that that goes into the classification or is allocated on the basis of labor and material? A. Yes, sir. Now, then, may we go back to the precision machine shop, and I will try to clear that up?

743 Q. Yes, all right. Now, here you said that the absorbed item is \$9,287.81, which was charged 35% to camera department, 50% to laboratory and 15% to sound. Now, I wanted you to tie that in with the amended account so that I could see where the charge, for instance, to the camera department, was reflected in this amended accounting. A. Well, if you will look at your camera account under 428, miscellaneous expense, there is the charge of the proportion of the precision machine department expense. It is charged in the camera department as miscellaneous expense, account 428.

744 Q. \$4,678.72? A. That doesn't necessarily represent it all, because there might have been other miscellaneous expenses. We had it subdivided. I may be able to give it to you in detail.

Q. Then, 35% of this item of \$9,287.81 is charged against the camera department and is in that item No. 428? A. That is correct.

Q. And the camera department, in turn, is allocated on a basis of 25% of direct labor? A. That is correct.

Q. All right, and the 50%, does that appear in the laboratory statement in a similar manner? A. It appears in the laboratory statement under account 313-5.

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. 313-5?

745

Mr. Driscoll: 313-5, yes. So that 50% of this absorbed item of the precision machine shop is charged against the laboratory department under Item 313-5, and in turn then, reflects itself into our amended account on the basis of the amount of work done by the laboratory for "Letty Lynton".

A. That is right.

Q. Now, the 15% that is charged to sound, will you trace that for me? A. That is charged in account 608. It would be on the first page of your sound department accounting, 608, percentage of precision shop overhead on C-13.

746

By Mr. Driscoll:

Q. And the 15% of this item of \$9,287.81 is charged to the sound department appearing in C-13 under item 608 and the departmental overhead of that department, in turn, is allocated to various pictures in accordance with footage and— A. Channel hours.

Q. And channel hours? A. Yes.

Q. In other words, the facilities used? A. That is correct.

Q. All right, that cleans that up. Are you ready to clean up this advertising department? You said you would come back to that one. A. That is something I would like to study a moment.

747

Q. All right? Then, that brings us down to C-11, which is foreign department. There is an absorbed item of \$94,016.56. I understand that that is allocated to the various pictures on the basis of \$1500 for each foreign version and \$500 for each synchronization. A. There is an additional spread on that too, that I will explain to you. In addition, Mr. Driscoll, to the \$1500 and \$500 overhead of which I spoke a while ago, we had a charge for supervision of foreign

Willard L. Craig—for Defendants—Recalled—Re-cross.

712 Polly of the Circus had 33 days. Exhibit C-25, I am reading from and it says that up at the top there, so I don't want to mislead you about anything that I name this particular item. There is a final cost of Letty Lynton of \$316,000 plus, and it had 33 shooting days. There is a final cost on Polly of the Circus which had 33 shooting days of \$430,000. There those two pictures paid exactly the same per day camera overhead expense, did they not, in spite of the fact that one cost 33% more than the other? A. That is true.

Q. Then, we come to C-7, the music department, and there also we have it on 23% of the direct labor; that is correct, isn't it, Mr. Craig? A. Yes, sir.

713 Q. And the departmental overhead, therefore, the music department as to all of the pictures, was on a percentage of the labor? A. That is correct.

Q. And the charges would vary in accordance with the labor; direct labor charges, to each individual picture? A. That is correct.

Q. That is a different basis from this other one, the publicity department, isn't it, a decidedly different basis?

A. Yes.

Q. Then we come to the art department, C-8, and the basis of charging, distributing the departmental overhead in that instance is 65% of labor charged against the individual picture? A. That is correct.

714 Q. And that, too, would vary in accordance with the amount of labor charged to each picture? A. That is right.

Q. And that is the same scheme of allocating the departmental overhead that we have had in each and every one of these different departments with the exception of wardrobe and publicity? A. Yes.

Q. The answer is yes. Then we come to the construction department, C-9, and the basis of allocating departmental overhead there is 5% of labor and materials? A. 5% is correct.

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. To the direct charges against each picture? A: Yes. 715

Q. Of course that one in turn would vary also in accordance with the charge of labor and material to the individual picture? A. That is right.

Q. And that conforms with the others that we have had with the exception of wardrobe and publicity. Then we come to property department, C-10, and the basis of distributing the department overhead there is 14% of labor? A. That is correct.

Q. Against the direct labor charge for each picture, and that, of course, would vary in accordance with the direct labor charge? A. Yes, sir.

Q. And it is consistent with all of the others that we have had thus far, except publicity and wardrobe? A. Yes. 716

Q. Now, then, we come to C-11, that is the foreign. We haven't taken that up yet. We won't come to that. We'll pass that until we take it up on direct. The next one is commissary, revenue and expense report. There is no departmental overhead expense charge against pictures there, is there? A. No, sir. That is, only direct charges against pictures are included in that statement.

Q. Direct charges, yes. A. That would show under the company charges in the revenue group.

Q. Then we come to sound charges, C-13, and there you charge on a channel-hour basis, do you not? A. That is correct. 717

Q. Against each picture? A. Yes, a channel hour basis against each picture and also a footage basis on the re-recording film.

Q. So that that is really based upon labor. It varies? A. No, not based on labor, entirely. It is based on the time that the facilities of the sound department are utilized by a company. It includes system labor and everything else.

Q. In other words, a picture that would use the facilities

Willard K. Craig—for Defendants—Recalled—Re-cross.

730

Q. Let's turn to camera department and see what item it is reflected in. Is it in there in that figure of \$1,045.17?

A. Do you want to continue and let me pick that up later? I will have to locate a journal in order to be sure which account that is.

Q. We will come back to that, that is C-17. Now, we come to C-18, portrait department. We have an item there absorbed in the cost of \$21,571.50. Now, will you show me how that is reflected in the amended account? A. The entire portion of the portrait department expense represented by 599 that is absorbed in the cost, goes directly into your publicity expense under account 532. If you will turn to Exhibit C-6, you will see account 532 includes a charge, portrait department expense \$21,599.12.

731

Q. Exhibit C-6, \$21,000? A. There is a slight difference; that is, C-6, carries a few dollars more than the total portrait department expense absorbed into the costs.

Q. That is the 532 item? A. Yes.

Q. \$21,599.11. That item is \$21,571.50. A. There is a slight difference there, but that is where the cost goes. It goes entirely except for the outside sale of photos. In other words, the portrait department is a function of the publicity department for purposes of accounting which we carry in a separate departmental expense and charge the entire expense into the publicity department.

732

Q. Then, this item of \$21,571.50 is only reflected indirectly into the amended account, that is true? A. Through your publicity charge.

Q. Through your publicity department? A. That is correct.

Q. In the publicity department we have already discussed. That is where we divide the overhead 70% to shooting pictures and 30% to preparation of pictures. A. That is correct.

Q. All right. Now, then, let's turn to C-19, miniature and trick department. I take it that no part of that is absorbed by the individual pictures? A. No. That becomes

Willard K. Craig—for Defendants—Recalled—Re-cross.

a general overhead item because it is a purely experimental department. It appears in your amended accounting, miniature and trick department with a debit of \$12,280.69 for the year.

733

Q. That is— A. —in part of your general overhead expense.

Q. Schedule A, page 1? (Defendants' Exhibit 18E.2.)

A. Page 2.

Q. Page 2? A. Yes.

Q. Then, we come to Newcombe's Department, C-20. There we have an item absorbed into costs of \$49,575.44. Where is that reflected in the amended account? A. On page 3 of the "Fatty Lynton" accounting, we have an item about the 5th from the bottom of the page, page entitled Special Shots.

734

Q. Yes. A. Newcombe shots \$1,092.80.

Q. Yes. A. And it is so reflected in the other pictures throughout the year.

Q. What was the basis of that allocation? A. The distribution that is made by Newcombe covering his departmental expenditures for the week.

Q. Beyond that, beyond the fact that it is made by Newcombe, do you know what the basis is? A. Well, no. He is the only man that can tell what his department is doing. He can't do it on a time basis because it is a very small department consisting of himself and two or three assistants and they are working on a number of different jobs all the time. So, I have to depend on him to tell me what portion of the time he has spent on the various pictures. That is the basis of the distribution.

735

Q. While they are getting that out on this other item under Special Shots, Reis shots, \$195.75, that is a direct charge? A. That is a direct charge, yes. That comes from his time card. Reis is a trick camera man who does trick photography work on a camera mounted on some kind of an apparatus. I have forgotten. I don't know hardly how to describe it, but it is a trick camera processing shot.

Willard K. Craig—for Defendants—Recalled—Re-re-direct.

By Mr. Hilborn:

Q. Which we have in C-25. Now, that would make a different Schedule A-2, because part of what is now in Schedule A-2, would then appear in the production costs of "Letty Lynton"? A. Yes.

Q. So that we would have to have— A. You take the same out for all the other pictures.

Q. That is correct. You see what I mean, in other words, you could prepare an account which put into the cost of "Letty Lynton" part of the studio overhead and the unabsorbed portion in a new schedule A-1 and A-2? A. Yes.

Q. Will you do that for us? A. I will prepare it for you, yes, sir.

Re-direct examination by Mr. Pollak (continued):

Q. Mr. Craig, would you turn to Exhibit C-25. A. Yes, sir.

Q. That exhibit shows in next to the last column, a computation by days on a percentage basis of the various pictures, totalling 56; that were in whole or in part produced during the year 1932; is that right? A. Yes, sir.

Q. Completely. There are three sets of pictures, those only produced in the fiscal year 1932, those partly produced in the fiscal year 1931 and partly in the fiscal year 1932; those partly produced in the fiscal year 1932 and partly in the fiscal year, 1933, is that right? A. That is correct.

Q. Now, then, if you take the pictures wholly produced in the year 1932 and add to them the total of the percentages of pictures produced in 1931 and partly in 1932, and the percentages of pictures partly produced in 1932 and 1933, proceeding by days, how many pictures do you get as produced in 1932. It is a mere matter of addition, but

Willard K. Craig—for Defendants—Recalled—Re-ré-direct.

I think the record should show it. - A: The addition of the percentages as shown in that next to the last column which is a percentage of the days shot in 1932, represented to the shooting days, added together is 3,702.1. To get the number of completed pictures represented by that percentage, you would divide that figure by 100 and you would have 37 completed pictures.

781

Q. Now, then, the last column again takes the pictures partly produced in 1931 and partly in 1932, the pictures wholly produced in 1932 and the pictures partly produced in 1922 and partly in 1933, does it not? A. Yes.

Q. Tabulating them this time, not by shooting days, but by cost; is that right, by cost? A. By cost, yes, sir.

782

Q. And on that basis, how many pictures do you get as produced in the year 1932? A. The total percentages there amount to 3,640.7. Divided by 100, it would give you thirty-six and four-tenths pictures completed.

Q: Now, Mr. Craig, there are one or two minor matters.

Special Master Auchincloss: Just before you leave that.

Mr. Pollak: Yes.

Special Master Auchincloss: What theory are you proceeding under, 41 pictures or 37 or 36?

Mr. Pollak: Well, Judge, it is a question of law which will arise at the end of the case. We have thought that on this important matter of overhead as to which the courts have said that the exact method of computation is a matter that in effect is arbitrary, because the whole element is an element that by definition is incapable of exact measurement or apportionment, we thought we should put in all the theories that seemed to us right. Now, speaking for myself—

783

Special Master Auchincloss: Well—

Mr. Pollak: I beg pardon?

Willard K. Craig—for Defendants—Recalled—Re-re-direct.

784

Special Master Auchincloss: I don't mean to preclude all this argument, but let me get this straight: When you set up this amended account—

Mr. Pollak: Yes.

Special Master Auchincloss: You predicated your overhead on one forty-first of a certain amount.

Mr. Pollak: Yes.

Special Master Auchincloss: Now, what was that based on?

Mr. Pollak: That was based, as I understand, on release dates.

Special Master Auchincloss: On what kind of release dates?

785

Mr. Pollak: Do you know, Mr. Cohen?

Mr. Driscoll: 41 pictures turned out to the public during that fiscal year.

Special Master Auchincloss: Well, what I am trying to find out is, take the item of "Grand Hotel" that Mr. Driscoll raised. Was that one of the pictures which was included in this one-forty-first?

Mr. Driscoll: No.

The Witness: Yes, it was.

Mr. Pollak: It was.

Special Master Auchincloss: Why shouldn't you say which one you applied to this thing?

786

Mr. Pollak: I am perfectly free to say in the first place—suppose we get the facts straight—you understand that neither Mr. Craig nor Mr. Schwartz nor Mr. Hilborn nor I had anything to do with this New York accounting, this 41 business.

Mr. Driscoll: That puts it right up to Mr. Cohen.

Mr. Pollak: It is a problem of accounting that seems to have arisen with the New York accountant, not with the New York lawyers, as a matter of fact.

Special Master Auchincloss: No, I know all that, but I am trying to get at this fact—

Willard K. Craig—for Defendants—Recalled—Re-re-direct.

Mr. Pollak: Suppose you get the 41 pictures listed 787
to see how many of them are in here. We will give
you the 41 pictures and that will answer your
question in a moment after we have the 41.

The Witness: Do you want me to call the pic-
tures off?

Mr. Pollak: Yes, I would read them off.

Special Master Auchincloss: Call them by num-
ber, will you?

Mr. Pollak: All right.

The Witness: I don't have the numbers.

Mr. Pollak: Then, call them by names.

Mr. Hilborn: We will have several lists.

Special Master Auchincloss: What is this (indi- 788
cating)?

Mr. Pollak: An exhibit showing the pictures.

Special Master Auchincloss: Are we going to
mark this as an exhibit?

Mr. Pollak: It might be well to mark it. This
is a list of pictures released.

Special Master Auchincloss: This is Exhibit 27,
isn't it?

Mr. Pollak: It is a list of pictures released during
the fiscal year 1932 regardless of when they were
produced.

(Instrument in question was marked Defendants' 789
Exhibit C-27.)

Special Master Auchincloss: And this totals 41
pictures, is that it?

Mr. Pollak: We will count it to make sure.

Mr. Driscoll: That is right. There are 41 pictures
there.

Mr. Pollak: Now, state your question to me,
Judge.

Willard K. Craig—for Defendants—Recalled—Re-cross.

The Witness: I can't tell you either. I don't have the releases out here.

Mr. Driscoll: I have considerable information, but not that. The release date that I have is September 10th, 1932.

A. Well, what I have here now—I am not in a position to testify to this absolutely, because as I say, I haven't the release schedule, but I have the New York release date here as April 12th, 1932. I think that is the date that the first showing of Grand Hotel was made.

Q. You mean— A. April 12th, 1932.

Q. It came within this fiscal year? A. Yes, a month after "Letty Lynton" was made. You have got the general release date there. I think that is what you have.

Q. Yes, probably the general release date. But it was the general release date that you used in figuring 41 releases during the year?

Mr. Pollak: He didn't figure it.

The Witness: I didn't figure it.

Mr. Driscoll: Somebody else figured it. If you know how it was figured, can you tell me if it was the general release date that was used?

A. I don't know. I can't say.

Q. Can you tell me this, isn't it a fact that you had 41 general releases during the fiscal year, that fiscal year, 31-32? A. The only thing I can tell you is that there were 41 pictures used for this accounting based on the release dates.

Q. That is all you know about it? A. That is all I know about it.

Q. All right. Well, the point that I want to make is this: Assuming that the general release date of Grand Hotel was September 10th, 1932, which was after this fiscal year,

Willard K. Craig—for Defendants—Recalled—Re-cross.

it is a fact; nevertheless, is it not, Mr. Craig, that practically the entire final cost of Grand Hotel was expended prior to the expiration of this fiscal year and a total of \$695,067 was charged off prior to the expiration of this fiscal year? A. That is correct.

763

Q. So that less than \$300 went into the following fiscal year; whether the general release date came in the next year or not? A. That is right.

Q. Now, one other question, Mr. Craig, which I think might be helpful to us and to the Special Master. You have on your Schedule C-25, a total production cost for the fiscal year of 1932, of \$16,204,197.54. In that you have charges for overhead, studio overhead against each picture on the basis of camera-shooting days. A. That is correct.

764

Q. Now, turning to the amended account, Mr. Craig, you have this overhead item of \$2,246,793.28. How much of that \$2,246,793.28 is in this \$16,204,197.54? A. There was absorbed in the—let's see now. Perhaps you had better read the question so that I will be sure.

Q. (The question was read by the reporter.) A. A. \$2,153,868.

Q. \$2,246,793.28 is included in the production costs for the fiscal year totalling \$16,204,197.54, is that correct? A. That is correct.

Q. Now, Mr. Craig, previously you testified, unless I misunderstood you, that there was an item of unabsorbed costs of \$787,498.48 which I understood to be part of that \$2,246,793.28, and if that is correct, there would be unabsorbed of that \$2,246,000, \$1,459,294.80, so the two things don't synchronize, the sound or the picture is off, one or the other. A. Well, I think you have got a combination of questions there, Mr. Driscoll. The first question that you asked me, we were talking about general overhead and I tried at the time to explain to you that I was distinguishing from the departmental overhead and from the various overheads like the unabsorbed stock company.

765

Willard K. Craig—for Defendants—Recalled—Re-cross.

Q. Yes. A. Now, you are switching me back to a statement that includes all of those things as a part of the net figure. I am trying to reconcile the two.

Q. I may be entirely in a fog, but I am just anxious to get out of that fog and to grasp these figures if it is possible for me to do so. A. If you will take your amended accounting, Schedule A (Defendants' Exhibits 18-E1 and 18-E2).

Q. Yes. A. You have listed there in detail the various departmental expenses and other miscellaneous expenses that go into the studio overhead.

Q. Yes. A. That takes up all of page 1 (18-E1).

Q. Yes. A. Then, page 2 continues (18-E2), the statement adding the various under and over absorbed items for the year.

Q. Yes. A. The result being a net overhead charge of \$2,246,793.28.

Q. Yes. That is both departmental and everything balanced up. A. That is correct. Now, when you were asking me the question awhile ago as to the amount of general overhead that I had unabsorbed at the end of the year, I was speaking from a statement that represented only the general overhead items that show on the first page of this accounting.

Q. I see. A. Which total \$2,941,366.48.

Q. Yes. A. That leaves the figure of \$2,153,868, which I have just given you.

Q. Yes. A. It gives you the original figure of unabsorbed general studio overhead that I gave you in the first instance, \$787,498.48.

Q. I see. In other words, the difference comes in the unabsorbed portions of departmental overhead? A. That is right. We are talking about two different statements.

Q. Yes. I am glad to be shown the light, not deprived of the light. Now, let's turn to C-25 again, on the second page there. There are some parts of that that are not clear to

Willard K. Craig—for Defendants—Recalled—Re-cross.

me. I don't presume to understand all of it or much of it, as a matter of fact. The second page there, Mr. Craig. We have here that first summarization after your row of figures, you have a cost at August 26th, 1931, 234 days. You get the figure I am referring to? A. Yes, I see it.

Q. Now, then, in your next classification, it is increased for the fiscal year ending August 24, 1932, and your summarization of days is 1360 days. A. That is correct.

Q. I take it that that is the item of days that were added during that fiscal year to the various productions? A. That is true.

Q. Now, then, why is it that those two items do not total this total of 2,122? A. Simply because I have not gone into the statement by adding the amount increased subsequent to that and then a total. I was only trying to get the total percentage that the 1932 costs represented to the picture. Now, the difference between those three, the first two columns plus whatever increase there might have been subsequent to August 24th, 1932, represents the total. I could have put another column in there, but I didn't need it. I thought it would be a more cumbersome statement to add the items subsequent to completion and it is self-apparent.

Q. In other words, to get this total of 2,122 days, you would have to have the items of 234 plus the item of 1360, plus another item of days required during the next fiscal year, to finish those pictures? A. You can see it on the last item there. In the White Sister there were no production days at all during '32, but we had 58 later.

Q. I see. A. So your difference is subsequent days later.

Q. Yes. Now, there is one other thing here that hasn't been clear to me and I would like to have you explain it. Under that increase for fiscal year ending August 24th, 1932, you have first a column of days, then you have hours, 2991½. Just why is that? Why isn't that in terms of days, or how does that come about? A. Well, under the Cosmo-

769

770

771

Harry Cohn—for Defendants—Direct.

790

Special Master Auchincloss: Now, was this a basis of the amended accounting?

Mr. Pollak: I understand it was.

Mr. Cohen: It was.

Mr. Pollak: As far as your question to me is concerned, Judge, subject to correction by further information that I may get from the New York office, if you just want my personal attitude at this time, I do not believe that this 41 basis is right.

Special Master Auchincloss: That is all right. I don't care so much about that at this particular moment.

791

Mr. Pollak: Yes.

Special Master Auchincloss: All I want to do is try to get this basis for this amended accounting and then other facts you want to put in.

Mr. Driscoll: This is marked in evidence?

Special Master Auchincloss: Yes.

(At 2:00 o'clock P. M. the hearing was resumed, all parties being present.)

792

HARRY COHN, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Harry Cohn.

Q. Mr. Cohn, what is your present occupation? A. President, Columbia Pictures Corporation.

Q. That is a producing company? A. Producing and distributing.

Q. Producing and distributing, and will you tell us in general terms your experience in the motion picture industry? A. From what point?

Harry Cohn—for Defendants—Direct.

Q. Well, as long as you have been in it, but in a rather general way, what positions you have held and where they were and so on. A. I was with the Universal Film Company for a year and then I organized the C. B. C. Film Sales Corporation which consisted of my brother, Jack Cohn, Mr. Joe Brandt and myself. Three years later we changed the name of the company to Columbia Pictures Corporation, with Mr. Joe Brandt as President, myself as Vice-President and my brother as Secretary-Treasurer. In 1931 I purchased Mr. Joe Brandt's stock and became the president of the corporation. I have been out here 20 years and I would say between 15 and 20 years as the producing head of the company. I have been so since its inception.

793

Q. I think that is sufficient for our purposes. Now, Mr. Cohn, about how many pictures do you make a year, just in round figures. A. 50.

794

Q. About 50? A. 50 besides shorts.

Q. 50 feature pictures? A. 50 feature pictures.

Q. You have testified that you are connected with the distribution as well as the production end? A. Well, I wouldn't say that I am connected with distribution, as well. Being the head of the company, I naturally know what is going on in the distribution end of the business. I know the distribution end to a certain extent.

Q. Now, from your experience with production and distribution, have you formed an opinion—don't tell us what it is, at the moment—but just tell us whether you have or not formed an opinion as to the relative drawing power of written material which we will call the story, and of the production. Have you formed an opinion? Just yes or no. A. Well, I know, yes.

795

Q. I take it in connection with any given picture, the ratio between the two depends on a great many factors, does it not, Mr. Cohn? A. Yes, sir.

Q. The greater a star is, the greater his contribution.

Willard K. Craig—for Defendants—Recalled—Re-cross.

754 that were in production at the end of the fiscal year ending in August, 1931, and overlapped into the fiscal year of 1932?

The Witness: That is correct.

Q. And the same is true of those four items down below?

A. Yes, sir, and two on the succeeding page.

Q. Yes. Now, when you charged up departmental overhead allocated on the basis of labor and material, you allocated to those pictures similar charges during such weeks as they were actually in production in this fiscal year? A. That is correct.

755 Q. And so, at the end of the year, we come to a time when you again close your fiscal year and you have certain incomplected pictures that carry over into the following fiscal year? A. That is true.

Q. And those also appear on this list here, those further down toward the end of the list, that carry it over into the following fiscal year? A. Yes, sir.

Q. And as to these pictures, up to the end of the fiscal year, that is, up to the end of August, 1932 in a similar manner from week to week, you carried over the allocation, you charged up the allocation of this departmental overhead, these various departmental overhead items? A. Yes, we did.

756 Q. Now, in this amended accounting, when they came to charge up an overhead item of \$2,246,793.28, that is divided up on an entirely different basis, isn't it? It is divided up on one forty-first to each picture regardless of cost or time taken in the shooting, isn't that correct? A. There has been no change made in the distribution of the departmental costs in the amended account.

Q. I am not talking about that, Mr. Craig. See if you can follow my question. I thought I made it clear. I am not talking about the departmental allocation. We have already covered that in detail. That was allocated from

Willard K. Craig—for Defendants—Recalled—Re-cross.

week to week on the basis that we set forth here as to each department, most of them being on the basis of labor and material or one or the other. A: That is correct.

757

Q: And was done from week to week and went into the direct charges against the picture. A: That is right.

Q: Now, aside and apart from those allocations of departmental overhead, we have an item on this account of overhead, \$2,246,793.28. That is divided up one forty-first against each picture. That is the method that is used in this accounting, isn't it? A: Yes, sir, in the amended accounting.

Q: Yes, for dividing up that item of \$2,246,793.28, and that method of dividing up that overhead is an entirely different method from the method that you have used as to these 56 pictures that were in production at the studio during that fiscal year? A: That is correct.

758

Q: This division here in the one forty-first for each picture does not in any way depend upon either the cost of the picture, the labor or the material or the use of facilities. It is a numerical division based on pictures released. That is correct, isn't it? A: That is correct.

Q: It is not even depending upon the pictures that were worked on during the year; it is just on pictures released regardless of when they were made. That is right, isn't it? A: Yes, sir.

Q: And as a matter of fact, you take Grand Hotel, that was released right after the expiration of this fiscal year, isn't that correct? It was released on the 10th of September, 1932. A: I haven't the release schedule, Mr. Driscoll.

759

Q: Well, you do know that it was released shortly after the end of the fiscal year, don't you, Mr. Craig? A: If I remember rightly, Grand Hotel was road-showed, was it not?

Mr. Cohen: Yes, it was.

Mr. Driscoll: I can't tell you that.

Willard K. Craig—for Defendants—Recalled—Re-re-direct.

772 politan contract, I have explained before, we had an arrangement whereby we would charge them on an hourly basis for retakes on their pictures, rather than on a daily basis. We charged them \$1250 a day for shooting days and when they were in retakes, we charged them \$125 an hour. They might have shot one hour or eight hours a day.

Q. This item of 299 1/2 hours— A. —represents the retake hours made on Cosmopolitan productions during that year.

Q. On Cosmopolitan productions during that year? A. That is right. I have set it out that way rather than try to confuse by an arbitrary break down into days.

Q. I am not criticizing that. I am looking for information. As I am trying to explain why I put it that way. There are many ways of trying to figure that out as to what the days constitute.

Q. How many camera hours are there in a camera shooting day? A. There are no fixed hours because it depends on your day's work. Sometimes they shoot three hours. Sometimes they shoot two hours. They are all camera days. We have the argument that they have tied the studio facilities up for that day whether they used them all day or part of the day.

Q. You say there is no recognized standard of camera shooting hours to camera shooting days? A. No.

774 Q. So it would be impossible, then, to reduce this Cosmopolitan time to camera shooting days so as to co-ordinate it with the other camera shooting days of the studio? A. The only basis that you could do that on was that in 1932 our normal working day was eight hours. We would assume the day for a camera man, 48 hours per week.

Mr. Driscoll: That is all.

Re-direct examination by Mr. Hilborn (resumed):

Q. Mr. Craig, in order to straighten out one thing in connection with your general studio overhead, you attempted

Willard K. Craig—for Defendants—Recalled—Re-re-direct.

to absorb it at the rate of \$1559 per camera day in the same way that you attempted to absorb your camera department overhead upon the basis of a percentage of the direct costs? A. Yes, sir. 775

Q. And to a certain extent that might have been under absorbed or over absorbed? I mean your general studio overhead might be through the charge of \$1559 a camera day? A. It might have been, yes.

Q. And you could prepare a schedule for A-2 (18-E-2) showing the total studio overhead, the unabsorbed studio overhead at the rate of \$1559 a day, couldn't you? A. You have it in your accounting there, Mr. Hilborn.

Q. Well—A. It is not set out as a separate item, but if you will add your—maybe I didn't understand your question. 776

Q. Well, what I mean is this, you could prepare for us an account which showed the cost of "Letty Lynton" including in the cost the 33 camera days at \$1559 a day and showing the unabsorbed studio overhead in the Schedule A-2, so far as the general studio overhead accounts are concerned in the same manner as it has been shown now for the departmental overhead, and showing the total amount of unabsorbed studio overhead based upon a total cost of \$316,000 for the "Letty Lynton" production costs?

Mr. Driscoll: It is simply the difference between the two accounts, the difference of \$316,000. 777

The Witness: I don't quite follow your question. First I can give you the cost of "Letty Lynton" including the 33 days at 1559 a day?

Q. Yes.

Mr. Driscoll: Which we have in C-25.

A. That is right.

Harry Cohn—for Defendants—Cross.

802 Cross examination by Mr. Driscoll:

Q. Mr. Cohn, how much was paid for Abie's Irish Rose?
A. I wouldn't know. You would have to ask Mr. Zukor that. He made it.

Q. How much was paid for Way Down East? A. I think you will have to ask Mr. Zukor that, he made that, too.

Q. How much was paid for Gone with the Wind? A. I think about \$40,000.

803

Q. As a matter of fact, Mr. Cohn, the cost of a well known story or well known play is substantially more than 5% of the cost of the picture, isn't it?

Mr. Driscoll: Well, isn't it usually substantially more than 5% of the cost of the picture?

A. Not necessarily.

Q. Well, it isn't a case of "necessarily". I want to know if it isn't usual? A. No, I wouldn't think so.

Q. You don't think so? A. No.

Q. Can you give me an instance of a well known story or play where the cost of the story was less than 5% of the cost of the picture? A. Yes, I think I can.

Q. Give me one, please. A. Criminal Code. \$25,000.

804

Q. The story cost \$25,000? A. \$25,000.

Q. Was that a play or a story? A. A play.

Q. And what did the picture cost? A. About \$600,000.

Q. The picture cost \$600,000 and the story cost \$25,000?

A. \$25,000.

Q. Can you make a picture, Mr. Cohn, without material?

A. Not very well.

Q. You have to have literary material, haven't you? A. That is right.

Q. You have to have a story and you have to have a play? A. You have to have a story or a play.

Harry Cohn—for Defendants—Cross.

Q. Or a play, yes, and it isn't unusual or strange for the management or maker of the picture to pay a writer doing the story, doing the picture story work, \$25,000 for a single picture, is it, after buying his story and after buying his original story or his original play? A. I don't agree with that.

Q. Well, do you know that in this case they paid John Meehan above \$24,000 to write "Letty Lynton"? A. It is possible.

Q. After buying the book? A. That is possible.

Q. Yes; and that is not unusual, is it, Mr. Cohn? A. Yes, but you are talking now about the continuity.

Q. I am talking about the work done by the writer, right within the studio. A. Your question first was about the purchase of a play. Now you are talking about getting it ready for the screen.

Q. I am talking about something else now, Mr. Cohn. I am not talking about the cost of the original play now or the original book. I am talking about the cost of getting it ready for the screen. A. Yes.

Q. Yes. Now, then, when you buy a play, you don't have to do as much work on it as you do on a story, do you? A. I think you have to do just as much work. I have found it that way.

Q. Oh, you have. Now, let me see, Mr. Cohn. Your play is in dramatic form, isn't it? A. Yes.

Q. Your story is not in dramatic form, is it? A. It wouldn't make any difference.

Q. I see. Your play is reduced to a certain number of characters, isn't it? A. Yes.

Q. Your book is not reduced to any small number of characters or story? A. Right.

Q. So, you have to reduce your characters, you have to reduce your dialogue, you have to get your dialogue out of that book? A. Yes.

Q. And you have to reduce the number of scenes? A. That is right.

Harry Cohn—for Defendants—Cross.

814 no, I wouldn't even say well known—any fair piece of property.

Q. All right. Now, then, are we justified in taking as your testimony that you fix 5% of the receipts as due to the story if it is any fair, well known piece of property? A. Fairly well known.

Q. Fairly well known piece of property? A. Yes.

Q. You fix 5%? A. Yes.

Q. So that there wouldn't be over 5% difference in the receipts of the picture between a fairly well known piece of property used as a story and any original story that one of your staff writers might write? A. That is right.

Q. That wouldn't be over 5%? A. No.

815 Q. Mr. Cohn, aren't there many elements that enter into the success of a picture or any play? A. I don't understand your question.

Q. Well, aren't there many contributing factors, put it that way, to the success of any play or any picture? A. Definitely.

Q. It is necessarily so, isn't it? A. Definitely.

Q. Don't you know, Mr. Cohn, that it requires many things to manufacture a successful automobile? A. Yes, and it requires the same thing to a motion picture.

Q. Yes. A. I will agree with that.

816 Q. Yes, fine. Now, we are getting somewhere. We are agreeing. In the making of a motion picture, taking a successful play after the play has had a run on Broadway and has established a name for itself, there are several elements of value in that play, aren't there? A. Several in the play?

Q. Yes. A. Possibly, yes.

Q. You have the literary material? A. Yes.

Q. You have the name? A. The name of what?

Q. The name of the play. You have the names of the authors if they are well known authors, isn't that right? A. I don't think it means a thing.

Q. You don't think George Kaufman's name in connec-

Harry Cohn—for Defendants—Cross.

tion with a motion picture means any more than my name would mean? A. Not if it wasn't a good picture. 817

Q. Well, let's get away from that for a minute, Mr. Cohn. Necessarily you have to have a good picture or you can't sell it. You have to have a good hat or you can't sell it.

A. Well, I would say Kaufman is a very good name.

Q. And Kaufman's name means something in connection with a play, doesn't it? A. No, sir.

Q. It doesn't mean anything? A. I don't think it sells any tickets at all.

Q. Well, then, do you think the name M G M sells any tickets? A. Yes.

Q. Of course it does, and so does Kaufman's name as the author of the play. A. I wouldn't agree with that. It might sell a few but not enough to take into great consideration. 818

Q. Well, by the same token, then, let's see, Mr. Cohn. We have in connection with a successful play the material. We have the name of the play which has received certain advertising through the run of the play. We have the good will that the play has built up with the public. The public has come to regard a certain piece of property of certain value because of the advertising it has received. That is true, isn't it? A. To a certain extent.

Q. Yes. A. I would have to know where that play played, did it play all over the United States or did it just play in New York? 819

Q. If it played all over the United States it would have just so much greater good will than if it had only played in Providence, Rhode Island, or Albany, New York? A. I would say that might enhance its value a little.

Q. And if it had had a New York run, it would have considerably greater value and good will than if it just played Philadelphia? A. It all depends how long it ran in New York and if it ran in other parts of the United States.

Q. In other words, the run of the play means consider-

Adolph Zukor—for Defendants—Direct.

832

Q. So you did have a great script in making this picture? A. Yes, I would say we had a very good script.

Q. Yes. Now, then, let me understand. Maybe I misunderstand you, Mr. Cohn. This 5% that you put upon material is simply the original material that you purchase, is that it? A. Yes.

Q. And the story that you make into a picture as it appears on the screen is definitely worth something more than 5% of the gross receipts? A. Yes. I will add a little more.

Q. Oh, I see. All right. That is all.

833

Mr. Pollak: No re-direct. Thank you very much. Do you want the information about the story?

Mr. Rubin: Yes.

Mr. Driscoll: No, I didn't ask for it.

(Discussion was had off the record.)

Mr. Cohn: The original story was entitled "Night Bus" and the writer was Francis Adams.

(Witness excused.)

ADOLPH ZUKOR, having been first duly sworn, took the stand and testified as follows:

834

Direct examination by Mr. Pollak:

Q. Mr. Zukor, would you tell us your experience in the motion picture business, including your present position?

A. I have been in the motion picture producing business, producing motion pictures for the last 25 years. The firm name was Famous Players Film Company originally, which was incorporated in 1912, I believe, and the present corporation is Paramount Pictures Corporation, the successor of Famous Players. I have been with it ever since its inception.

Adolph Zukor—for Defendants—Direct.

Q. What is your present post with it? A. I am in charge of production at the Hollywood studio. 835

Q. What is your title? A. Chairman of the Board of Directors.

Q. Had you previously been president of the corporation? A. I was president of the corporation to two years ago.

Q. And you were president in 1932? A. Yes, sir.

Q. Now, Mr. Zukor, you have heard the testimony of the last witness, or some of it? A. Not all of it, I was out of the room.

Q. First, some rather general questions: Am I right in this, Mr. Zukor, that in the case of any given picture, the portion of its gross receipts that is ascribable to the original written material and the portion that is ascribable to the production including under production the producer, the director, the distributor, the executive organization, the proportion that you can ascribe to the story and the proportion that you can ascribe to all these other factors, varies from picture to picture, is that right? A. It does. 836

Q. Am I also right in this, that the more distinguished the stars are, the greater their contribution to the success of the picture will be? A. Yes.

Q. Now, in 1932, were you familiar with the position as a star, of Miss Joan Crawford? A. Yes.

Q. And what would you say that position was? 837

Mr. Driscoll: I take it that this is all subject to my objection to all of this line of testimony?

Special Master Auchincloss: Yes.

Mr. Driscoll: As having nothing to do with this, and not within the issues that are referred to the Special Master to hear and report.

Special Master Auchincloss: With the same exception.

Harry Cohn—for Defendants—Direct.

796 to the drawing power of a picture, is that right? ~~A.~~ That is right.

Q. And the greater a given producer is, the greater his contribution will be, is that right? A. That is right.

Q. And the same for the director? A. That is right.

Q. And I take it the better the reputation of the producing company is, the greater the attraction of the producing company taking it as a whole, is that right? A. Right.

Q. Mr. Cohn, is this also true, that the attraction of the story will be greater if the story is identified by name with some very well known play or novel, for example?

797 A. Mr. Driscoll: Well, I want to object to this entire line of evidence as incompetent, irrelevant and immaterial and having nothing to do with the issues that have been referred to the Special Master to try in this proceeding. I want my objection on the record. I don't think the testimony makes any difference at all, but at the same time I think it is just clogging the record here with stuff that doesn't belong there, and I want to object to it.

Special Master Auchincloss: The objection is overruled with an exception.

The Witness: That is right.

798 By Mr. Pollak:

Q. And on the same principle, if the picture is not identified at all by name with any well known play or novel, the attractive power of the story will be less, is that correct? A. Right.

Q. Now, you are familiar, are you not, with the position of Miss Crawford, Miss Joan Crawford, as a star in 1932; just are you or are you not familiar with that position? A. Yes, sir.

Harry Cohn—for Defendants—Direct.

Q. And what would you say that position was? A. 799
You mean as a star?

Q. Yes. A. I would say she was a very big star.

Q. Would you say she was one of the leading half dozen stars? A. I would.

Q. Among the female stars, roughly, where would you classify her as of 1932? A. As one of the top notchers.

Q. And how for Mr. Montgomery, Robert Montgomery? A. Also a topnotcher.

Q. Would you say that he also was within the first half dozen as of 1932? A. He would be right up there.

Q. Realizing what you have already testified to, that the ratio between the story and the other contributions does vary from picture to picture, but, however, based on your general experience with the whole range of motion pictures, what would you say would be a high percentage of the gross receipts of a motion picture to be ascribed to the story? 800

Mr. Driscoll: Object to this as mere speculation, absolute speculation and nothing else.

Special Master Auchincloss: We will take the testimony under your objection with an exception.

The Witness: I would say about 5%.

Mr. Pollak: Now, take a picture with Crawford and Montgomery as stars, Stromberg, as producer, Brown as director, bearing a name not identified with any well known play or story, under conditions existing in 1932, what proportion of the gross receipts would you say was ascribable to the story? 801

Mr. Driscoll: Same objection to that.

Special Master Auchincloss: The same ruling.

The Witness: The same percentage, about 5%.

Harry Cohn—for Defendants—Cross.

820 able; the greater the territory it covered, the longer the run, the more valuable the play? A. I would like to know how long it ran in New York first, how long it ran^o in other places. Then I could give you a better opinion.

Q. I am not asking you to fix a figure on it. A. I am not going to.

Q. I am asking you, Mr. Cohn, if it isn't true, that if it has had an extensive run, it is of more value than if it hadn't had an extensive run? A. Yes.

Q. Of course it is true. A. It would have more value.

821 Q. There can't be any question about it. Now, by the same token, you want to tell me it doesn't make any difference whether the material is any good in the motion picture? A. I didn't say that.

Q. No, but at any rate it wouldn't attract over 5% of the gross receipts? A. That is right.

Q. Now, how would you divide up the other 95%, Mr. Cohn? You gave 5% to material. What would you do with the other 95%? A. I would divide that up between the stars, the director—

Q. How much for stars? A. About 60% to 65%.

Q. 60% is due to the names of the stars? A. Right.

Q. All right, what would you do with the other 35%? A. The 35% remaining I would divide between the director—

822 Q. How much would you give to the director? A. I would give the director about 10%.

Q. Don't put it too high. You might have to boost their salaries if you do. 10% to directors and how much to the rest? What would you do with the rest? A. Divide that between the balance, organization, production.

Q. 25% would be due to organization and what else? A. Organization, that would take in the producer and everybody.

Q. Everything else. Now, how do you fix 60% to the stars? A. How do I fix 60% to the stars?

Q. Exactly how do you fix 60% to the stars? A. Well,

Harry Cohn—for Defendants—Cross.

if I had a picture that would gross, we will say \$350,000, and if I had two stars in my picture, I think my picture would gross a million if the stars' names were big enough.

823

Q. All right, how do you fix 10% to the directors? A. How do I fix 10%?

Q. Yes, how do you fix 10% to the director? A. I put 10% down for the director.

Q. I see. How do you know that it was 10% of the receipts of the picture which were due to the director?

A. Well, if I had a big director, I would figure 10% definitely to my director, a director of reputation.

Q. As a matter of fact, Mr. Cohn, you have to have proper direction or you haven't any picture at all, isn't that true? A. That is why I put 10% down.

824

Q. And you have to have proper literary material or you haven't any picture at all? A. That is why I put 5% down.

Q. And you have to have proper management and organization or you haven't got any picture at all? A. The same thing. I answered those things.

Q. Isn't it a fact that you can't allocate any definite percentages to any of those elements? A. Not necessarily.

Q. Well, I am not asking you about necessarily, I am asking you if it isn't a fact that you can't allocate it to it? A. Why can't I? I said I can.

Q. Because there is no way of fixing it except to guess at it, isn't that true, Mr. Cohn? A. We have done some pretty good guessing in our studio.

825

Q. Yes, I know you have. You have been very successful. I am not questioning that, Mr. Cohn. You have been very successful, but that doesn't change this situation here. Now, you take "Three Men on a Horse", is that a successful picture? A. I don't know. I didn't see "Three Men on a Horse".

Q. You don't know anything about it? A. I know the play was very good.

Harry Cohn—for Defendants—Cross.

S26

Q. How much of the success of that picture would you say was due to the fact that it was made from "Three Men on a Horse", the play that played in New York City? A. Do you mind asking that question again?

Q. I want to know what part of the box office receipts of that picture do you ascribe to the fact that it is made from a successful play, "Three Men on a Horse"? A. I don't know.

Special Master Auchincloss: Well, are the box receipts before us?

Mr. Driscoll: No. That is why I said it is impossible for anybody to put 5% down—

The Witness: I never even saw the picture.

Mr. Driscoll: —on the literary material. Who starred in the picture "Three Men on a Horse"?

The Witness: I didn't see the picture. I don't know.

Q. You don't know anything about that picture? A. No.

Q. Well, let's take one of your successes, Mr. Cohn. You have had a lot of them. A. Which one would you like?

Q. Let's take one of your best. A. "It Happened One Night."

Q. "It Happened One Night"? A. Yes.

Q. What was the story, was that an original play or was it— A. No, we bought a story. I think we paid \$10,000 for the story.

Q. Yes. Was that a musical? A. No. It was a picture and we borrowed Clark Gable from Metro and Claudette Colbert from Paramount. That picture cost \$350,000 to \$400,000 to produce. It grossed about \$2,000,000.

Q. And 60% of that \$2,000,000 is due to the two stars? A. Definitely.

S27

S28

Harry Cohn—for Defendants—Cross.

Q. And 10% to direction? A. Yes. You could add a little more to the director there because that is the greatest director in the motion picture business, with all due apologies to Metro.

829

Q. These percentages vary then? A. I just raised it up in that case.

Q. How high would you raise it in that case? A. 5%.

Q. Five more, that would be 15? A. Yes.

Q. And where would you take the extra 5% from so as to get it within 100? A. I would take it off production.

Q. That would make production 20%? A. Right.

Q. Because the director was 15? A. Because it was a cheap production as the total cost proves to you. If the cost was \$400,000, it was a cheap production. We put all the money there into the stars.

830

Q. The stars were still responsible for 60% of the receipts? A. Definitely.

Q. Definitely, and your material was responsible for only 5% of the receipts? A. Yes. You see, it was a short story. It had a great script on it that we didn't get out of the play, that we didn't get out of the material purchased, see? We bought a short story. I don't remember exactly—I could find out for you by the use of a telephone—I think it was in the *Cosmopolitan Magazine*.

831

Mr. Rubin: A Will Irwin Story, wasn't it?

The Witness: No, it wasn't Irwin.

Mr. Hilborn: "A Night in an Omnibus"?

The Witness: No.

Mr. Driscoll: But you had a great script there, didn't you, Mr. Cohn?

The Witness: No—the great script was written from the material we bought.

Q. I thought you said you had a great script? A. That is right. A great script was written from the original story that we purchased.

Harry Cohn—for Defendants—Cross.

08 Q. But, you say that it doesn't make any difference whether it is in play form or book form? If that is your testimony, Mr. Cohn, I just want you to say yes and that is all. I am willing to take it just for what you say.
A. Yes.

Q. That is your testimony? A. I say just as much work either way.

Q. All right. Now, then, Mr. Cohn, let me ask you how did you fix 5% as the receipts that may be ascribed to the story? A. Well, let's say that a picture grossed one million dollars for the sake of argument. I would say 5% was tops.

09 Q. So that it would only make 5% difference in that story, in that picture, whether you used, for instance, Uncle Tom's Cabin or Way Down East? A. Oh, Mr. Driscoll, you have a well known vehicle before you start when you take Way Down East.

Q. Yes. A. Or Uncle Tom's Cabin.

Q. They are both well known, aren't they? A. You have a terrific sale, you have no sales resistance. That will sell before you start, see?

Q. Yes. A. You take a play that is not well known or is fairly well known.

Q. Yes. A. I don't think you will get anything like that.

10 Q. You say it doesn't make any difference whether it is a play, it is not going to make over 5% difference whether the story is an original story or whether it is a well known play, it is not going to make over 5% difference in the receipts? A. No, I didn't say that. You mentioned Way Down East and you have mentioned—what is the other?

Q. Uncle Tom's Cabin? A. You mentioned two. I don't think there has been a greater seller than Way Down East, with the possible exception of the Bible.

Q. Yes, all right. Let's take something else. You say that 5% is due to the material or to the story? A. Yes.

Harry Cohn—for Defendants—Cross.

Q. Now, then, in your opinion, Mr. Cohn, it doesn't make over 5% difference in the receipts—the gross receipts of a picture, whether you have a well known play like First Lady, for instance, or whether you have an original story? A. First Lady?

Q. Yes. A. I don't know what you mean by First Lady.

Q. Well, there is a play called First Lady, isn't there?

A. Yes.

Q. Jane Cowl's play? A. Yes.

Q. And it wouldn't make over 5% difference maximum in the receipts of the picture whether you had a play of the rank of First Lady or Once in a Lifetime, or any well known play, or whether you had an ordinary original story? A. Well, now, again you go into Once in a Lifetime, that is well known.

Q. Yes. But your testimony, Mr. Cohn— A. Yes.

Q. —is that you can't ascribe over 5% of the gross receipts to the story. A. It all depends on two things. First you say a well known play. That is entirely different. I can raise a little bit on that.

Q. How much would you raise on that?

Mr. Pollak: He hadn't finished the answer.

The Witness: That all would depend on who you would put in the picture, who would direct the picture, who would produce the picture.

By Mr. Driscoll:

Q. All right. Coming back to your answer, Mr. Cohn, you were asked to fix a percentage, which I say is foolish, but you were asked to fix a percentage of receipts that you would ascribe to story and you said 5%. A. What kind of a story? If you will ask that.

Q. I don't know. I didn't answer the question, Mr. Cohn, you did. What kind of a story did you have in mind when you fixed 5%? A. Any fairly well known—well,

Jesse T. Mills—for Defendants—Direct.

874 Cross examination by Mr. Driscoll:

Q. What depreciation do you allow on those buildings from year to year? A. On the Class A buildings, reinforced concrete structures, steel, $1\frac{1}{2}\%$.

Q. Annually? A. Annually, yes, depreciated annually.

Q. And on the other buildings? A. On the others from two to three per cent. They vary.

Q. That would be $1\frac{1}{2}\%$. You figure the life of the buildings to be about 65 years. A. Yes.

Q. And on the others you figure up to 50 years? A. Yes.

875 Mr. Driscoll: That is all.

Mr. Schwartz: That is all, Mr. Hubert. Thank you very much.

(Witness excused.)

Special Master Auchincloss: Well, are you all finished, Mr. Pollak?

Mr. Pollak: I think we are.

New York Hearings (Continued).

At the offices of the Special Master, No. 50 Broadway, New York, N. Y., April 20, 1937, 10:30 A.M.

876 Pursuant to mesne adjournments.

JESSE T. MILLS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Mills, what is your occupation? A. Accountant; I think that is all-embracing.

Q. You are in the employ of what corporation? A. Loew's Incorporated and its various subsidiaries.

Jesse T. Mills—for Defendants—Direct.

Q. How long have you been connected with Loew's Incorporated or its subsidiaries or any of the corporations that entered into that organization? A. From their inception in 1919, from the inception of its incorporation; prior to that with their predecessors, since 1913, I would say.

Q. Mr. Beery here is an associate of yours? A. Yes, he is a member of the staff.

Q. And the items concerning which you will testify, you have familiarized yourself with by examination of the books? A. That is correct.

Q. Mr. Cohen here informs me that you are a little modest in stating your position. You are not only an accountant; but you have a definite function in the organization? A. Yes, that is true.

Q. What office is that? A. Comptroller and Assistant Secretary, having charge of the accounts in general; the auditing of them; the financial reports, assembling of the various data that go into them, of course; the annual reports and periodical reports.

Q. Are you the head of the auditing department here in New York? A. I am.

Q. As to the M P P D A, will you please explain what those mystic initials mean? A. M P P D A, Motion Picture Producers and Distributors of America; that is ordinarily known as the Hays organization, of which we are members, and to cover their expenses all distributors pay a fee based on one-half of one per cent. of their gross receipts.

Q. Of each picture? A. We take the figures for the year and set the rate for the coming year, that is, your gross business, so that it means each picture.

Q. It is really the sum of the grosses of several pictures? A. Yes.

Q. The figure that is given here (Defendants' Exhibit 18-D5) is \$3,630.12. Will you tell us how that figure was arrived at? A. That was arrived at by taking the total

Willard K. Craig—for Defendants—Recalled—Re-direct.

856

Q. Have you also the reproduction value and the sound value of the buildings? A. Yes, sir.

Q. Will you give us those figures? A. The reproductive value of the buildings, was \$1,119,324.83, and the sound or depreciated value was \$953,301.91.

Q. All as of June, 1925? A. As of the date June 30th, 1925.

Mr. Hilborn: That is all.

Mr. Driscoll: No questions.

(Witness excused.)

857

Mr. Pollak: Mr. Craig, we might as well continue with your testimony.

WILLARD K. CRAIG, having been previously duly sworn, resumed the stand and further testified as follows:

Re-direct examination by Mr. Pollak (resumed):

Q. Mr. Craig, would you explain the item on the amended account of unused continuity—I will withdraw the question. What was your inventory value in the fiscal year 1932 of unused continuity?

858

Special Master Auchincloss: Where is it in this account?

Mr. Driscoll: Page 5 (Defendant's Exhibit 18-D5).

Mr. Pollak: The detail of it is going to be given in New York, your Honor.

The Witness: The inventory of our continuities as carried on our books August 24th, 1932, \$1,628,425.04.

Mr. Rubin: Unused continuities.

The Witness: Those were unused continuities.

Willard K. Craig—for Defendants—Recalled—Re-direct.

Examination by Mr. Hilborn:

859

Q. The books were kept on the fiscal year basis, Mr. Craig? A. They were.

Q. Now, have you made an examination of your total records of salaries unassigned to any particular picture? A. We have analyzed the unassigned salaries that are shown in the various departmental accounts to which I have previously testified.

Q. And can you give us any detail as to what the items consist of, Mr. Craig? A. The items of unassigned salaries, include, as I have stated previously, those salaries which could not be charged directly to any production. They result from vacations given to people in the department and to charges for legal holidays, for which they were paid but did not work. That is one of the main items in the unassigned salary account through the various departmental accounts.

860

Q. Mr. Craig, have you computed the additions to building and equipment from June 30th, 1925, down to the close of the fiscal year ending August 24th, 1932? A. I have the schedule on equipment. I didn't carry it on buildings.

Q. I see. Will you give us the items added to equipment from June 30th, 1925, to the close of the fiscal year ending August 24th, 1932? A. This is subsequent to the appraisal value which was testified to by the American Appraisal expert.

861

Q. Yes. A. For the period ending August 26th, 1925, that covers the period July 1st, 1925 to August 26th, 1925, additions, \$63,102.09. For the fiscal year ending August 25th, 1926, the additions were \$147,469.86. For the fiscal year ending August 31, 1927, the additions were \$163,051.32. For the fiscal year ending August 29th, 1928, the additions were \$100,048.25. For the fiscal year ending August 28th, 1929, the additions were \$352,435.58. For the fiscal year ending August 27th, 1930, \$410,678.95. For the fiscal year

Willard K. Craig—for Defendants—Recalled—Re-direct.

862

ending August 26th, 1931, \$366,090.77. For the fiscal year ending August 24th, 1932, the increase was \$155,654.41.

Q. Have you the same figures for the addition of properties during those periods? A. That is included as your equipment.

Q. Included in there, I see, properties and equipment. Now, Mr. Craig, you have prepared and are having typed a statement— A. Yes, sir, go ahead.

Q. —showing the allocation of the studio overhead upon the basis which we discussed this morning. Has that been finished? A. Yes, sir.

863

Special Master Auchincloss: Are you offering this?
Mr. Hilborn: Yes.

(The instrument in question was marked Defendants' Exhibit C-29.)

By Mr. Hilborn:

864

Q. Mr. Craig, the figures on the first page of Exhibit C-29 down to the total, down to the \$2,941,366.48 are identical with the figures which are shown on Schedule A-1 (18-E2) of the amended account, the total of \$2,963,000 being the total of the debit items and the total of \$2,175,908 being the total of the credit items? A. That is correct.

Q. Now, the item of \$2,153,868 is the overhead charged to the pictures similarly to the charge of "Letty Lynton" of \$1559 a day for 33 days? A. That is correct.

Q. And the aggregate charge to all the feature pictures and to the shorts was \$2,153,868? A. That is right.

Q. Deducting that from the studio overhead of those accounts, it left an unabsorbed general overhead of \$787,498.48, which you carried onto the next page as a debit balance? A. That is right.

Q. Now, the other items on the second page of this

Willard K. Craig—for Defendants—Recalled—Re-cross.

account, are identical with the items which are shown on, 865
the second page of Schedule A? A. That is correct.

Q. Schedule A of the amended accounting, Schedule A-2
of the amended accounting? (Defendants' Exhibit 18-E2.)

A. Yes, sir.

Q. That leaves an unabsorbed studio overhead of
\$92,925.28? A. That is right.

Q. Which is carried onto the next page of this account
with the items of overhead, which were attributable to New
York? A. Yes, sir.

Q. Leaving a total overhead of \$3,424,809.97 which, as
of the close of business in Los Angeles, was not absorbed
into picture costs? A. That is right.

Q. I want to ask you one more question. This Schedule 866
A-1 presupposes that there has been added into Exhibit
C-29 the cost of "Letty Lynton" as shown on the amended
account, that portion of the studio overhead which was
charged to the picture at the rate of 33 camera days of
\$15.59? A. That is true.

Q. Making a total cost of "Letty Lynton" of \$316,139.48
plus its share of the unabsorbed overhead of \$3,424,809?

A. What is the figure on "Letty Lynton"?

Q. I should say \$316,192.23. A. \$316,192.23 is correct.

Q. Plus the share of the unabsorbed overhead of
\$3,424,809.97 as shown on Exhibit C-29. A. That is cor-
rect.

Special Master Auchincloss: All right, Mr. 867
Driscoll.

Re-cross examination by Mr. Driscoll (resumed):

Q. Mr. Craig, you have given us the items of property
and equipment that have been added in the intervening
years since July, 1925 down to and including August, 1932.
What depreciation have you taken against those items? A.
We do not set up a depreciation at the studio. It is set
up in New York. I can't tell you.

Cyril Provo Hubert—for Defendants—Direct.

868

Q. That is all set up in New York? A. Yes, sir.

Q. So you are unable to say what, if any, depreciation has been taken against those items? A. That is correct.

CYRIL PROVO HUBERT, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Schwartz:

869

Q. Mr. Hubert, what is your position with Metro-Goldwyn-Mayer Corporation at the studio? A. I am the structural engineer and estimator.

Q. And how long have you occupied that position? A. For seven years with the exception of one year that I went away.

Q. And what was your experience before you came to this studio as an estimator? A. Well, I was estimating for large construction companies like the William C. Crowell Co., where it involved a million to two million, making estimates, bidding on competition.

Q. And over what period of your life were you engaged in such estimating for various concerns? A. Oh, for around 12 years.

870

Q. Before you came here to the studio? A. Well, yes, just about, design and appraisals.

Q. Did you make an appraisal of the values, both replacement and sound values of the buildings, which stand upon the property of Metro-Goldwyn-Mayer here at the studio for the years 1931-32? A. Yes, I did.

Q. Will you tell us—have you those appraisals with you? A. Yes, I have.

Q. Will you tell us what the replacement value, arrived at by you of the buildings alone, was for the years involved and give us the time as of which the appraisals were made.

Cyril Provo Hubert—for Defendants—Direct.

A. All right. The 1931 appraisal is dated January 1st, 1931, replacement value was \$2,543,241.52. 871

Q. What was the sound value? A. The sound value was \$2,194,777.53. The appraisal on the buildings for the following year, 1932, as of January 1st—

Q. What you gave us before must have been 1931? A. 1931, yes. For the year 1932, the replacement value was \$2,717,591.04. The sound value was \$2,305,649.87. 872

Mr. Schwartz: That is all.

Special Master Auchincloss: Just as an explanation, does he mean the permanent buildings out here? He doesn't mean all these property buildings? 872

Mr. Schwartz: Well, they are all permanent buildings.

Special Master Auchincloss: I mean these buildings that have been put up for particular pictures.

Mr. Schwartz: No, no.

Q. To what buildings do you refer? A. That is the permanent structures, that has nothing to do with motion picture sets or such as that.

Q. Do you happen to know how many buildings there were of that character in 31-32? A. Well, that classification of 1931 was 100 buildings and of 1932 it was 101 buildings, but that does not mean that there is that number of buildings on the lot. We tear down buildings and replace some of these, and some of them are minor structures. 873

Q. But at the time involved, those were the buildings that were here at the time and the values placed upon them? A. Yes, although I have a miscellaneous construction of some minor buildings that have not been classified, like sheds and such as that. They have been grouped together.

Mr. Schwartz: I see. That is all.

Adolph Zukor—for Defendants—Direct.

838 By Mr. Pollak:

Q. Do you want the question read?

(The question was read by the reporter.)

A. She was one of the most popular young ladies of the screen at that time.

By Mr. Pollak:

Q. In the very front ranks of stars, would you say? A. Yes, she ranked among the first.

839 Q. And what was the position of Mr. Robert Montgomery? A. Very much the same among the men.

Q. Am I also right in this, Mr. Zukor, that in determining the relative proportion of success ascribable to the original written material and to other factors, the distinction of the producer makes some difference? A. Quite a difference.

Q. And is the same true as to the director? A. Yes.

Q. And what would you say of the distinction of Mr. Stromberg in 1932 as a producer? A. He was an outstanding producer then.

Q. And Mr. Thalberg, the chief producer of Metro Goldwyn Mayer at that time, what was his position? A. Tops.

840 Q. Now, we come to the director. Are you familiar with the position as a director of Mr. Clarence Brown in 1932? A. Yes.

Q. And what was that position? A. An outstanding director.

Q. Now, am I right in this, that the drawing power of the written material, the original story is diminished if the picture does not bear the name of any play or novel or story known to the public? A. Right.

Q. Now, allowing, if you already have allowed for the fact that the ratio of these various factors changes from

Adolph Zukor—for Defendants—Direct.

picture to picture, would you care to put a percentage estimate, taking the field of motion pictures as a whole, on the contribution that the story makes to the gross receipts of motion pictures? A. The story largely depends on the treatment it receives before it is put on the screen by way of continuity, and story strength develops after it is put into continuity.

841

Q. Well, now, I am not considering the treatment received in the studio. I am not considering the writing of the continuity or as it is sometimes called in some phase or other the scenario or I believe it is now called the shooting script, I am not considering at all the writing within the studio, but I am considering only—these things are different than I have mentioned, are they not? A. Yes.

842

Q. I am not considering any of them, do you see? I am considering only the original story before the studio has done anything to it. What proportion of the success of the picture would you say was ascribable to the original story?

Mr. Driscoll: I object to that. It is impossible for anyone to say that, because the original story is not presented to the public. How can you say that it is responsible for any part of the receipts?

Special Master Auchincloss: I think he is right on that.

843

Mr. Pollak: If your Honor please, Mr. Zukor's very point is that the story receives what is very happily called the treatment.

Special Master Auchincloss: Go ahead and let it go in. I don't think it means a great deal.

Mr. Driscoll: It doesn't mean a thing.

By Mr. Pollak:

Q. Well, you may answer, Mr. Zukor. I am asking you now about the original story before treatment of any sort

Adolph Zukor—for Defendants—Direct.

by the studio writers is given it. A. Well, the gross receipts, what proportion the original story has to the gross receipts?

Q. Yes. A. The best way I can answer that is perhaps by illustration, by saying what does our average story, that is a good story, cost us? That is all I can answer. If that is permissible, I will say that the value of that story would run, say \$25,000 and if the picture as you speak of, you say it grossed a million, you can figure out that that would represent 2½%.

Q. Now, Mr. Zukor, taking the written material as finally presented to the public, what do you call it then, the shooting script? A. Yes.

Q. Mr. Zukor, take a picture with Crawford and Montgomery as stars, Stromberg as producer, Brown as director, bearing a name not identified with any well known play or story under conditions existing in 1932, what proportion of the gross receipts would you say was ascribable to the story?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial. The witness has not testified that he was familiar with that story or ever read it. Neither has he even testified that he has seen the picture and he is asked as his expert opinion as to how much of the receipts of the picture were due to the story.

Special Master Auchincloss: I don't think it is very useful, but go ahead.

Mr. Pollak: If it helps you, I will tell you that the picture grossed somewhat in excess of \$1,000,000.

(Addressing the Special Master.) He is testifying as an expert, and I have purposely made the question hypothetical.

Q. Now, you may answer. A. If the picture grossed a million dollars, with Clarence Brown as director and

Adolph Zukor for Defendants—Cross.

Stromberg producing it and the stars appearing in it, I 847
would say that it did at least 65% to 70% on the strength
of the producer, director and cast.

Q. Of the producer, director and cast? A. Yes.

Q. And how much of a percentage would you ascribe
to the original story? A. It is very difficult to describe
that as a percentage. I would say that if you paid for
the story \$25,000, you would pay a good price for it. What
relation that has to the gross that you did do or didn't do,
is hard for me to mathematically analyze that for you.

Q. Well, let me get at it this way; you may just answer
yes or no. Have you, yourself, made contracts with writers
on a percentage of the gross receipts? A. We have.

Q. And what is the highest percentage in any such con- 848
tract?

Mr. Driscoll: Objected to as immaterial, irrele-
vant and incompetent, not within the issues.

Special Master Auchincloss: Go ahead, with the
exception.

Mr. Driscoll: Mr. Zukor's firm is not being sued
in this case.

Mr. Pollak: You may answer, Mr. Zukor, what
was the highest percentage of the gross receipts you
have ever given to a writer?

A. As near as I recall, we paid 7%.

Q. And to whom did you make that payment? A. J. M. 849
Barrie.

Q. The English playwright? A. Yes.

Q. For what picture was that? A. It was for Peter
Pan.

Mr. Pollak: You may cross examine.

Cross examination by Mr. Driscoll:

Q. I just have one question, Mr. Zukor. There isn't any
definite test, is there, Mr. Zukor, as to what draws the
money into the box office? A. Oh, there is.

Adolph Zukor—for Defendants—Cross.

850

Q. You mean you can always predict just what causes it to come into the box office? A. You can always tell what comes in, yes. You can tell who draws—the stars—I mean you can differentiate between a picture with and without stars. Therefore, you can differentiate, you can establish the drawing power of the stars.

Q. Isn't it true, Mr. Zukor, that frequently a picture that is a mere program picture in the making, turns out to be a real box office attraction? A. In every instance where that happens, it still doesn't measure up to the receipts that it would have gotten had there been a star, a well-known personality in it.

851

Q. Oh, I agree with you on that, Mr. Zukor, but I am coming down to the fact of what draws the money into the box office. Doesn't it frequently happen that you make a program picture expecting the picture to be merely a program picture and it turns out to be a big hit and draws the money into the box office and you didn't expect it. Doesn't that happen frequently? A. It does not frequently happen. It happens rarely.

Q. It happens at times? A. Yes.

Q. Now, isn't it frequently true that a picture that you don't expect to be popular, proves to be popular with the public? A. That depends entirely on the combination of the ingredients that are in the picture.

852

Q. Well, in the picture business you can always tell them before hand just what you are going to do? A. After you see the picture, you can tell.

Q. You mean after the picture is made? A. After the picture is made, printed, you can tell.

Q. And ready for distribution? A. Right.

Q. Not before? A. No.

Mr. Driscoll: That is all.
(Witness excused.)

THOMAS D. LINDHOLTZ, having been first duly sworn, took the stand and testified as follows:

853

Direct examination by Mr. Hilborn:

Q. State your full name, please. A. Thomas D. Lindholtz.

Q. Where do you live, Mr. Lindholtz? A. Los Angeles.

Q. And what is your official position, please? A. Pacific Coast Manager of the American Appraisal Company.

Q. How long have you been Pacific Coast Manager of the American Appraisal Company? A. Approximately 12 years.

Q. Were you the manager at the time the land, buildings and equipment of the Metro Goldwyn Mayer Studio were appraised by the American Appraisal Company? A. Yes, sir.

854

Q. I show you a document and ask you what that is. A. This is a carbon copy of our summary volume of the appraisal which we made as of the date June 30th, 1925.

Q. Will you tell us what the value of the equipment was at that date? A. The reproductive or depreciated value?

Q. The depreciated value, the sound value. A. The sound value. The sound value of the equipment was \$1,041,546.75, not including props.

Q. What was the sound value of the props? A. The props were not appraised by us but were included in this appraisal with the qualification that it was based on information furnished by our client, Metro Goldwyn Mayer, and the value shown for that item—


855

Mr. Driscoll: I don't believe that is of any help to us. It is secondary evidence.

Mr. Hilborn: What was the reproduction value of the equipment?

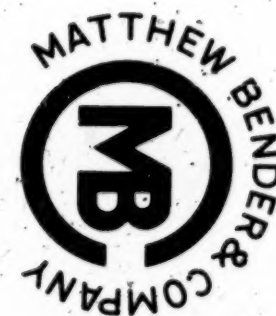
A. The reproduction value of that equipment was \$1,888,754.60.

MICRO CARD

TRADE MARK 

22

39



1411

65



Jesse F. Mills—for Defendants—Direct.

880 gross receipts of "Letty Lynton" in the United States proper as distinguished from the United States and its possessions. I think in our accounting we have shown that the gross receipts in the United States and its possessions was \$733,732.62 and that we find that the receipts from the United States proper was \$726,024.83, being approximately \$7,000 less than the so-called gross, it would seem, and we have calculated this one-half of one per cent. on the basis of this lesser amount of \$726,024.83; one-half per cent. of that equals the \$3,630.12.

881 Mr. Pollak: Mr. Driscoll, I want to ask this before going any further on this line: Do you want further proof of the fact that this payment was made?

Mr. Driscoll: No, I think the proof of the payment being made is sufficient.

Q. Mr. Mills, though I think we all probably have a general opinion of what the Hays organization is, would you explain for the record its general character? A. It is to protect the industry from unwarranted attack, see that the pictures released by the various distributors conform to proper moral and social standards. I think that in the main, describes their general function. I might add that I am sure that the amount received and collected on "Letty Lynton" by the Metro-Goldwyn-Mayer Distributing Corporation cannot be secured as a refund from the Hays organization.

882 Mr. Driscoll: I object to that as the statement of a conclusion.

Q. I will put it this way, Mr. Mills. You have been connected with motion picture accounting altogether for how many years? A. Twenty-four.

Q. How long has the M P P D A been in existence? A.

Jesse T. Mills—for Defendants—Direct.

I was frank to say I don't remember when it started,—a good many years, more than ten, certainly. 883

Q. Mr. Cohen informs me that it was formed as far back as 1919. I suppose that is subject to check. Have you ever heard of a case, Mr. Mills, of the refunding of payments made to that organization, computed on a percentage of the gross receipts?

Mr. Driscoll: Objected to as immaterial and irrelevant.

The Special Master: Why isn't it perfectly simple to find out on what basis—what are the facts of the case—are they supposed to pay on gross receipts? 884

Mr. Pollak: There is no question of that fact, Mr. Master.

The Special Master: Why don't you bring it out by testimony in some competent way? I should think that would be the simplest way.

Q. Mr. Mills, is there a written contract with M P P D A?

A. We have a contract; we haven't it here. I intended to state—I thought I did state in response to an earlier question, that the exact fee was based on the total of the year's gross receipts and that is used as a basis for the payment of the next year.

Q. And the gross receipts of the year are the totals of the gross receipts of the various pictures? A. Yes. 885

Mr. Driscoll: I accept your testimony that payment has been made, as prima facie proof that payment has been made.

By Mr. Pollak:

Q. Now, Federal income taxes have already been referred to. The item here mentioned is \$16,584.18. Will you explain how that was computed, Mr. Mills? A. That

Jesse T. Mills—for Defendants—Direct.

was computed on the amended accounting showing \$114,373.63 as the net receipts from "Letty Lynton", based on the rate of Federal income tax of that year of 14½ per cent.

Q. That is the profit net in the United States and its possessions, is that so? A. That is correct, as first amended.

Q. What do you mean, "as first amended"? A. Since this amended statement was filed, in getting into the details supporting a great many of the figures we have found what appear to me to be further items of cost, which I think calls for a further amended statement. Naturally, when those change this amount of \$16,000 will change.

Q. On the figures as they now stand in the amended accounting as now presented, that is a correct statement?

A. Yes, of the Federal tax.

Mr. Pollak: Mr. Driscoll, do I understand that you accept as to this Federal income tax matter, as prima facie evidence of the fact of payment, the testimony so far given?

Mr. Driscoll: I accept as prima facie evidence the testimony that the tax was 14½ per cent, and that the figure \$16,584.18 is 14½ per cent of the figure \$114,373.63, the profit that you set forth in the amended accounting of Metro-Goldwyn Pictures Corporation.

Mr. Pollak: And that the income tax was of course paid to the Government?

Mr. Driscoll: I assume it was.

Q. That is correct, is it? A. Yes, that was included in the amount of income tax paid.

Q. On the same page, Mr. Mills, of the amended accounting there appears an item of \$179,704.16, page 5 of Exhibit 3 (\$186,166.60 in Defendants' Exhibit 18-D 5), that being unabsorbed studio depreciation. Are you familiar with that item? A. I am.

Jesse T. Mills—for Defendants—Direct.

Q. Will you explain that item, Mr. Mills? A. It is an 889
item in connection with another item which was not substantiated at the Coast but was referred back to the New York office for substantiation, "Rental of Studio & Facilities \$334,464.61" (Defendants' Exhibit 18-E 1).

Q. Now, to go back to the question about unabsorbed studio depreciation—on page 5 of Exhibit 3 of the amended accounting there appears an item of \$179,704.16, unabsorbed studio depreciation (\$186,166.60 in Defendants' Exhibit 18-D 5); will you explain that item, Mr. Mills? A. Included with the \$179,704.16 which I wish to prove now is another item of \$334,464.61—

Q. Appearing on the next page? A. —appearing on the 890
next page—

Q. —of the amended accounting under the head of Rental of Studio and Facilities? A. Under the head of Rental of Studio and Facilities, which item was not proven at the Coast. Adding this \$334,464.61 together with \$179,704.16 gives us a total of \$514,168.77, both items entering into this general unabsorbed studio overhead. In addition to those items there should be a further item of \$6,462.44, making a grand total of \$520,631.21. That item consists of the following: Annual depreciation on buildings and equipment of the studios—and I suggest that since I have a schedule of those amounts of cost and the rates of depreciation used on the various elements I suggest that we submit this schedule showing that rather 891
than reading all the figures off.

Mr. Pollak: I think this should be marked in evidence; Mr. Master, I offer this schedule as Defendants' Exhibit 9.

(The schedule just offered was received in evidence and marked Defendants' Exhibit 9, of this date.)

Jesse T. Mills—for Defendants—Direct.

892

Q. That schedule shows the basis on which you computed depreciation of equipment and buildings, is that right?

A. At the Western studios, that is right.

Q. It includes, as you have stated, an item called apparently by the Hollywood branch "Rental of Studio and Facilities"?

Q. This is a complete statement of all items of depreciation of buildings and equipment at the Hollywood studios?

A. Hollywood and Culver City.

Q. The item of Rental of Studio and Facilities appearing in the amended accounting, Exhibit 3 on next, to the last page, does not represent any item of rental paid, is that true? A. That is true.

893

Q. Mr. Mills, do you know why the item was set up as "Rental of Studio and Facilities" and under that title? A. That title is an outgrowth of some years back when Mr. Mayer's contract was on a different basis. His contract at that time, some years ago, specified that there should be charged in lieu of depreciation and other various items a certain amount as rental of studio and facilities. That amount was fixed at that time, and no matter how much our depreciation was from the home office we always charged off to the studio this fixed amount, which has continued on, I am frank to say, to this date, so that our depreciation is split up and that item is charged in New York and is absorbed by it in their overhead and the remainder is charged on our books as direct overhead.

894

Q. They are both depreciation? A. Yes, they are just split up. The depreciation charge in that year amounted to five hundred thousand odd dollars.

Q. Mr. Mills, I notice that the depreciation factor is, of course, quite different as between equipment and buildings. A. They are different, of course, because they have different length of life, and based on their expected length of life.

Q. The equipment depreciates and especially becomes

Jesse T. Mills—for Defendants—Direct.

outmoded much more rapidly than buildings, of course? 895

A. Yes.

Q. Is the figure of 15 per cent. which you have used for equipment, sound equipment, is that in your view a reasonable figure? A. Yes.

Q. Is that based on your general experience? A. Yes, that is based on my general experience.

Q. Mr. Mills, are you familiar with the general practice of accountants in relation to the depreciation items in regard to equipment? A. I am not familiar with the exact rates; I am certainly familiar with the general practice.

Q. And this 15 per cent factor of yours is based in part upon your acquaintance with the general theory and practice of accounting? A. Yes, and further substantiated by the practice of the Internal Revenue Department in allowing these items as deductible from taxable income, and of course they are always anxious to reduce these wherever there is an element of doubt, if you are taking too high a rate. These rates have been low.

896

Q. The 15 per cent. and the 5 per cent? A. The 15 per cent. and the 5 per cent.

Q. And allowed as to the five per cent in the case of studio buildings? A. That is right.

Q. Now, as to the item of interest paid, \$1,559,559.75 which appears on page 5 of Exhibit 3, are you familiar with that item? A. I am.

897

Q. Will you explain that item in your own way to the Master? A. That is six per cent. interest on the amount of loans from Loew's Incorporated, to Metro-Goldwyn for the year ending August 31, 1932. I have the checks, 13 checks, making up the amounts of the payments, if you would like to see them. And I have a schedule showing the amounts of those 13 checks actually paid aggregating the total of \$1,559,559.75. This is for money loaned by Loew's, Incorporated, and invested by Metro in their pictures and processes, books and rights, pictures completed

Jesse T. Mills—for Defendants—Cross.

904

Q: This amended accounting so-called is the amended accounting of the Metro-Goldwyn Pictures Corporation; that is an entirely different corporation, is it not, from the Metro-Goldwyn-Mayer Distributing Corporation? A. It is a different corporation.

Q: The Metro-Goldwyn Pictures Corporation did not distribute pictures? A. Not directly.

Q: Metro-Goldwyn Pictures Corporation is a holding corporation, is it not, Mr. Mills? A. It is.

Q: It owns stock in various corporations? A. Right.

Q: And that is the only thing it does? A. No.

905

Q: What other function does Metro-Goldwyn Pictures Corporation perform? A. It takes over the pictures from the Metro-Goldwyn-Mayer Corporation at the Coast.

Q: Let me see. In this particular instance Metro-Goldwyn Pictures Corporation took over the negatives of "Letty Lynton" from Metro-Goldwyn-Mayer at the cost of production? A. To the Metro-Goldwyn-Mayer Corporation.

Q: What was that cost, as set up on the books? A. The cost on the books of the "Letty Lynton" production was a total of \$489,616.78.

Q: When was that put on your books, Mr. Mills? A. The total cost from the studio was put on the books upon the completion of the negative at the Coast, and further items added as expenditures were made.

903

Q: Can you tell me, Mr. Mills, when this picture was released? A. May the 7th, 1932, that was the final release date.

Q: So that you received your negatives from the Coast some time prior to May 7, 1932? A. Yes.

Q: Possibly a month prior to that? A. A month or two months.

Q: Were the prints made by the producing company or were the prints made by some other corporation? A. The prints were made by the Pictures Company. I am quite sure; they were made at the studio.

Jesse T. Mills—for Defendants—Cross.

Q. By the producing corporation? A. By the producing corporation. 907

Q. So that in addition to the negatives the producing company turned over to the Metro-Goldwyn-Mayer Distributing Corporation the prints? A. The positive prints.

Q. The positive prints in addition to the negatives. And those were taken over at cost; in other words, the producing company is a non-profit making corporation; is that correct? A. That is correct.

Q. It treats the other pictures that it makes in exactly the same way? A. In exactly the same way.

Q. And all of these negatives are turned over to the Pictures Corporation at cost? A. That is correct. 908

Q. Now, what did you estimate the cost to be at the time you took over the negative? A. The total transferred from the Coast in the first instance—I haven't the exact figure because they had other costs that came along after the physical completion of the negative, the physical shipment of the negative, but those items of our first set-up amounted to \$319,192.23.

Q. You say, other items of production cost came along later. How much later, after the shipment of the negative? A. There was approximately \$34,000 came in afterwards of which approximately \$33,000 were for the positive prints.

Q. You say, they came in afterwards? A. After the first charge of the negative. 909

Q. I want to find out what the first charge was and when the others came in. Do you mean to say that the first charge was \$319,192.23? A. That was after adding perhaps a couple of thousand dollars as an aftercharge to the first charge. The first charge might have been in the neighborhood of \$314,000. I suggest that if that is important that we telephone up and get these ledger sheets down here where we will have all those dates and amounts available.

Jesse T. Mills—for Defendants—Cross.

910 Q. I am going to examine you quite a lot on it so that I think if it will help you you should get them down.
A. We will send for them.

Q. Then we will pass that phase for a moment. Now, Mr. Mills, the Pictures Corporation takes over the picture, that is, the negative and the positives, from the producing company, at cost? A. That is correct.

Q. Now, then, what is the arrangement between the Pictures Corporation and the Distributing Corporation?

911 A. The Distributing Corporation may have some other items to add, a few small items in comparison with the total cost, which the Metro-Goldwyn-Mayer Corporation did not pay for. Then their arrangements with the Distributing company is that the Distributing company distribute throughout the United States on a percentage basis, a percentage of the gross receipts, that runs on a sliding scale up, which averages approximately 18 per cent. to the Distributing company.

Q. In other words, the Distributing company takes the picture from the Pictures Corporation just the same as any other distributory would take a picture from an independent producer, and distributes it? A. That is correct.

Q. Now, then, this accounting that you filed here of Metro-Goldwyn Pictures Corporation does not include any accounting by the Distributing company at all, does it?

912 A. It does not recognize the distinction between the two companies, if that expresses the thought.

Q. No, it does not express the thought? A. It is a combination of the two companies.

Q. It is a combination of the accounts of the two companies? A. That is right.

Q. Not the individual account of either company? A. Right.

Q. What method or means have you, Mr. Mills, to distinguish the figures here that really belong to Metro-Goldwyn Pictures Corporation from the figures that really

Jesse T. Mills—for Defendants—Cross.

belong to the Distributing company? A. Available at this session; I don't think I can break those figures down between the two companies. They are combined in our schedules. 913

Mr. Driscoll: This brings a different picture, Mr. Referee. Each of these companies is a separate defendant and the only accounts that have been filed here are the accounts for the Metro-Goldwyn Pictures Corporation and the Culver. 914

The Special Master: And he states that the account filed for the Metro-Goldwyn Pictures Corporation is really a combination of the accounts of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation. He offers to break that down. 914

Mr. Driscoll: Well, I was wondering if that could not be broken down immediately, that they should not prepare that account immediately. It presents a different picture, a different set-up and a different legal problem. 915

Mr. Pollak: Mr. Driscoll, my understanding is, subject to correction—Mr. Mills and the others would know—that the Pictures Corporation owns all the stock of the Distributing Corporation; it is just a legal distinction. 915

Mr. Driscoll: No, it might be or it might be more than that. It depends entirely upon whether they made profits or losses and whether or not you have the right to charge the losses of one corporation to the profits of another. Under the decisions, you haven't. We are entitled to know what part each corporation played in this and have an accounting by each corporation.

The Special Master: Do I understand that if you break down these figures and separate these

Jesse T. Mills—for Defendants—Direct.

not yet released and in their inventory of pictures which have been released less the amortization written off against them". In other words, the total of the loan is always comparable with the total inventory of the pictures. Hence we have included this item as a general item of expense in connection with the pictures.

Q. Did it represent moneys actually advanced and on which interest was actually paid? A. Yes.

Mr. Pollak: May I have the schedule, and will you hand a copy to Mr. Driscoll? I offer the schedule in evidence.

(The paper just offered was received in evidence and marked Defendants' E. Libit 10, of this date.)

Mr. Pollak: Do you want any other proof, Mr. Driscoll, of the payment of interest in the amounts set forth in Exhibit 10, or do you accept that exhibit as prima facie proof of the fact of interest payments?

Mr. Driscoll: I understand from Mr. Mills that he has checks showing these payments that are set forth in this schedule, to the order of Loew's Incorporated on the dates set forth here, and that is prima facie proof that those checks were paid to Loew's Incorporated on those particular dates. I do not see how I can ask for any more than that. That does not concede anything as to the propriety of the payments and charges against this picture.

HEARING OF APRIL 21, 1937.

901

JESSE T. MILLS, resumed:

Cross examination by Mr. Driscoll:

Q. Mr. Mills, which company are you employed by? A. The various companies. I am—

Q. Let us make it plainer, then. Which company— A. Directly by Marcus Loew Booking Agency.

Q. You say "directly"; you mean that your salary is paid by Marcus Loew Booking Agency? A. That is correct.

Q. But that you have to do with the affairs of all the various companies? A. That is correct.

Q. Which company produces the pictures, or did produce the pictures during the fiscal year 1931-1932 at the Coast or, in other words, ran the studios out there? A. Metro-Goldwyn-Mayer Corporation.

Q. You are fairly familiar with this accounting proceeding that was had out at the Coast? A. Yes.

Q. That is the one that was given out there? A. Yes.

Q. That had to do with the records of expenditures of the Metro-Goldwyn-Mayer Corporation, is that correct? A. That is correct.

Q. And with no other? A. That is correct.

Q. Now, what company distributes the pictures? A. Metro-Goldwyn-Mayer Distributing Corporation.

Q. And that was at that time a separate corporation from the Metro-Goldwyn-Mayer Corporation? A. That is correct.

Q. And the sole business of the Metro-Goldwyn-Mayer Distributing Corporation was the distribution of pictures? A. That is correct.

Q. It maintained a home office and it maintained branches or exchanges in the key cities of the country? A. That is right.

Q. It did not own or operate theatres? A. That is correct.

902

903

Jesse T. Mills—for Defendant—Cross.

916 accounts, it will show that the Metro-Goldwyn Distributing Company took 18 per cent. of the gross?

Mr. Pollak: That is right.

The Special Master: Is that what he says?

Mr. Driscoll: The account says 20 per cent., but Mr. Mills says 18.

The Special Master: In other words, he takes that as a distributing charge?

Mr. Driscoll: Yes.

The Special Master: I want to have that perfectly clear.

Mr. Pollak: We are going to prove it.

917 Mr. Driscoll: This was my thought. I thought this was simply the account of the Pictures Corporation and that that 18 per cent.—20 per cent. it said in here—was not accounted for at all, and it is my thought that we had to develop the situation and ask for an accounting of that 20 per cent., or 18 as it now appears to be, which would be a separate accounting by the Distributing Company. But now I find that instead of being that, there are figures of the Distributing company in here mixed in with this accounting of the Pictures Company.

The Special Master: I think you ought to clear that up.

918 Mr. Pollak: I think if you want, Mr. Driscoll, you can have a break-down showing which of the expenses of distribution were incurred by the Distributing company and which by the Pictures company. I don't think this is the time, as I have said before, to debate questions of law,—you with your confident assertion about the decisions—I will say this—I have known of cases before, many of them, in which counsel opposing a corporation or two corporations denounced as a mere fiction the separateness of the wholly owned subsidiary. I

Jesse T. Mills—for Defendants—Cross.

have never known of a case in which counsel insisted on the separateness or made any point of it. But if you feel that it would somehow facilitate matters to have the complete breakdown of the distribution expenses, it is an elaborate schedule mentioned to you yesterday, that Mr. Mills is preparing and which we hope to have ready on Friday; but if you also want a separate showing of which expense was incurred by the Distributing company and which by the Pictures company, I suppose that could be done. 919

Mr. Driscoll: There is nothing like establishing a precedent. I don't mind being the first one who distinguished between two corporations and asked for a separate account by two corporations. 920

Mr. Pollak: I will be glad to have you be the first one.

Mr. Driscoll: The fact of the matter is, however, as you can readily appreciate, that if the thing is mixed up in this fashion, if there is a distribution charge of 20 per cent. here, we ought to know where the mix-up is and get the record cleared up.

By Mr. Pollak:

Q. The charge of 20 per cent. against the Pictures Corporation appearing on that amended accounting as heretofore filed is a charge by the Distributing Company to the Pictures Company? A. No, that is not quite correct. 921

Q. As here set up? A. Yes.

By Mr. Driscoll:

Q. What are the facts, Mr. Mills? A. The facts are that the 20 per cent. was arrived at as the percentage of the gross for the cost of distribution—

Jesse T. Mills—for Defendants—Cross.

Q. To be put into this account? A. Of the expenditures of both the Pictures Company and the Distributing Company.

Q. For the purposes of this account? A. For the purposes of this account.

Q. Going a little further, your picture is turned over by the Pictures Company to the Distributing Company. Is your Distributing Company a profit-making organization?

A. It is.

Q. They distribute and pay the cost of distribution and the cost of distribution is deducted from the gross and in addition to that a certain margin for distribution? A. Except that all expenses of distribution are not paid by the Distributing Company, but some of them by the Pictures Company.

Q. The ordinary distribution of a picture includes the maintenance of a distributing home office in New York City, the maintenance of branches in the key cities of the country, and in each of these there is a manager and a certain number of salesmen? A. Yes.

Q. The salaries of these various employees are paid. Are any of these expenses paid by the Distributing Company or the Pictures Company? A. Distributing Company.

Q. The rent of those offices are paid. By whom are they paid? A. By the Distributing Company; all branch offices by the Distributing Company.

Q. In addition to that there are certain express charges and things of that sort? A. Yes.

Q. These are paid by the Distributing Company? A. Yes.

Q. And of course you have the ordinary incidental expenses of a branch office, clerk hire, stenographer hire, stationery expense and postage and things of that sort, those are all paid by the Distributing Company, are they not? A. Correct.

Q. In addition to that, from time to time in the distribu-

Jesse T. Mills—for Defendants—Cross.

tion of a picture it is necessary to make certain prints, replacements, whether they are replacements of an entire print or of a part of a print? A. Right. 926

Q. The charges for those are taken out of the gross receipts? A. They are added to the original cost of the picture.

Q. So they don't reflect this in the gross receipts? A. No.

Q. Who does that work? Is that work done by the Distributing Company or does the Distributing Company call upon the Pictures Company to make these replacements and send them to you? A. The Pictures Company makes the replacements.

Q. Now, other than making replacements, what expenses of distribution are carried by this Pictures Company? A. The main office, the head office, almost the entire expense of that head office is for distribution. There are only two functions of the company, production of pictures and distribution of pictures. The production of pictures is carried on at the Coast. A very small portion of head office expense, salaries and all that, is attributable to the production. The major part of it is a cost of distribution, although paid by the Pictures Company. 926

By the Special Master:

Q. When you talk about the home office, what do you mean? A. I mean the office here in New York. 927

Q. Of what company? A. Of both companies.

By Mr. Driscoll:

Q. Of all the companies, as a matter of fact, including Loew's and the Pictures Company and the Distributing Company and the Producing and all the other companies. How many Metro companies were there? A. I think that three would cover the field, the Metro-Goldwyn-Mayer Cor.

Jesse T. Mills—for Defendants—Cross.

928 poration, the producing company; the Metro-Goldwyn-Mayer Distributing Corporation, the distributing company; the Metro-Goldwyn Pictures Corporation which takes over production and is the parent of the other two. That covers, I am quite sure, the corporate set-up for the domestic.

By Mr. Pollak:

Q. In addition to the foreign companies? A. There is another company, if you want to go into the foreign. I understood you were talking of the domestic. There is another company called the Calver Export Company which in turn owns the stock of the companies doing business with various foreign countries.

By the Special Master:

Q. You said the Distributing Company was a profit-making corporation? A. Yes, Sir.

Q. What happens to the profits? A. It is usually paid over as a dividend to the parent, Metro-Goldwyn Pictures Corporation.

By Mr. Driscoll:

930 Q. Taking the Pictures Corporation again, in so far as "Letty Lynton" is concerned, it took over from the Distributing Company the gross receipts of this picture, less that part of the expense that the Distributing Company paid out? A. Retained.

Q. Retained. The Pictures Company took over all of the rest? A. That is correct.

Q. Can you tell us how much money this Pictures Company took over from the Distributing Company? A. I can when I get these ledger sheets down; that will show everything.

Q. Do you know, Mr. Mills, when money stopped coming

Jesse T. Mills—for Defendants—Cross.

in on this picture? A: That also I will be able to tell you 931
from those sheets. I can tell you the majority of the
domestic income was received between its release in May
and the end of the fiscal year on August 31st. A com-
paratively small amount was received after that from do-
mestic distribution.

Q: We will pass that until we get the further informa-
tion.

Q: Have you your ledger sheets on these other things we
were talking about? A: Yes (producing papers).

Q: I will ask you this question: Mr. Mills, you now 932
have your ledger sheets that you stated a few minutes ago
were at the office; they have since been brought to you?
A: Yes, that is correct.

Q: You have those before you? A: Right.

Q: Are you able to tell me just when this cost of film
was set up on your books? A: Yes.

Q: Will you kindly do so? A: There was a total cost
transferred, to that date, from the studio.

Q: From what date? A: To May 25th, the total cost
ascertained of \$311,505.58. On June 4th, 1932, an addi-
tional \$63.72 was transferred; on June 29th an additional
\$188.44 was transferred; on July 27th an additional \$183.79
was transferred; on August 31st an additional \$3,197.95
was transferred; on October 6th an additional \$25.70;
and on October 29th an additional \$27.05. Those addi- 933
tional items, totaling \$4,686.65, added to the \$311,505.58,
makes the total of \$316,192.23, being the total negative
cost transferred from the Coast.

Q: Now, your Pictures Company transferred to the Pro-
ducing Company a credit for \$316,192.23, for the cost of
that negative?

The Special Master: What is that?

Q: Your Pictures Company gave to the Producing Com-
pany a credit for \$316,192.23, that is correct, isn't it, as

Jesse T. Mills—for Defendants—Cross.

934 the cost of the negative? A. That is correct, the cost of the negative.

Q. Now, Mr. Mills, since that time you have added to that figure \$173,424.55, to make up what you now say is the cost of the picture of \$489,616.78? A. I don't seem to have that figure here.

Q. You gave me, a few minutes ago, before your books came down—I asked you what appeared on your books as the cost of this picture, and you said \$489,616.78. That included the cost of the foreign items as well. As I understand it now, we are only talking here of the domestic. If we are only talking of the domestic, that \$489,616.78 is entirely erroneous.

935 Q. That is an entirely erroneous figure? A. When we are referring only to the domestic.

Q. Let us get this a little clearer, if we can. Your domestic business is handled by the Culver Export Company? A. No, our foreign business is handled by them.

Q. I made a mistake in using the name. Your foreign business is handled by Culver Export Company? A. That is true.

Q. What is the arrangement under which Culver Export Company takes over the prints from the Pictures Corporation? I suppose it takes them from the Pictures Company, does it not? A. Yes.

936 Q. The Pictures Company having bought it from the Producing Company, then the Pictures Company turns it over to Culver for foreign distribution? A. That is correct.

Q. What is the arrangement under which the Culver Export Company takes the pictures from the Pictures Company for distribution? A. Culver pays the Pictures Company 25 per cent. of the negative cost.

Q. In other words, Culver takes the prints for foreign distribution, upon a payment to the Pictures Corporation of 25 per cent.? A. Of the negative cost.

Jesse T. Mills—for Defendants—Cross:

Q. And then Culver distributes? A. And pays for their 937
own positive prints, for foreign distribution.

Q. And if it has profits it handles them as dividends?
A. Right.

Q. Over and above whatever it cost it to do business.
Now, then, the 25 per cent. that Culver pays to the Pictures
Company was 25 per cent. of this figure, \$316,192.23? A.
That is correct.

Q. Now, can you tell me from your ledger sheets, when
you got the last income on this picture? A. The last item
of actual domestic income was on December 20, 1934, being
a small amount.

Q. What was the last on foreign? A. The last we have 938
reported is July, 1936. If there were any small items that
came in after that this would be subject to an amended
return.

Q. Mr. Mills, you said the arrangement between the
Culver and the Pictures Company was that Culver took
over the foreign distribution on a payment to the Pictures
Company of 25 per cent. of the cost of the negative? A.
That is right.

Q. Was that money actually paid to the Pictures Com-
pany? A. Through a running account.

Q. It was credited to the Pictures Company? A. Yes.

Q. Now, are you familiar with the Culver amended ac-
counting in this proceeding? A. I would like to look at it 939
again. I have not seen it in so long a time. (Paper handed
to the witness.)

Q. This accounting of Culver does not show that it paid
over to the Pictures Company \$79,048.06, which is 25 per
cent. of the cost of the negative, \$316,192.23, does it? A.
No.

Q. Nor does the account which has been filed by the Pic-
tures Company show a receipt from Culver of \$79,000 odd?
A. That is true.

Q. Now, let us come to this item of studio depreciation

Jesse T. Mills—for Defendants—Cross.

940 which you stated yesterday is \$514,168.77, I think. In so far as these accounts are concerned that are now before the Special Master; they showed two items of studio depreciation, as you explained yesterday, Mr. Mills, did they not, totaling \$514,168.77? A. The total depreciation was \$520,631.21.

Q. Let us follow my question, please. A. I tried to.

Q. I said that in so far as these accounts that were filed with the Special Master were concerned, they showed two items of depreciation that total \$514,168.77, did they not?

A. So far as those accounts are concerned.

941 Q. Since then you say there should be added an item for \$6,462.44? A. Right.

Q. Making a total of \$520,631.21? A. Correct.

Q. You have presented here a schedule that has been marked Exhibit 9, showing depreciation information, have you not? A. I have.

Q. On the schedule you show depreciation in Culver City of studio buildings at the rate of five per cent. per year, or a life of twenty years; is that correct? A. That is correct.

942 Q. In making that allowance of five per cent. a year you do not take into consideration the different types of buildings; you just put them all on a flat depreciation of five per cent. per year, or a twenty-year life? A. That is correct.

Q. Now, on the amended accounting of the Metro-Goldwyn Pictures Corporation (Defendants' Exhibit 18-E1) the item of \$334,464.61 appears under the heading of Rental of Studio and Facilities; is that correct? A. That is correct.

Q. And that is the way it was carried on the books of the Corporation, was it not? A. At the Coast.

Q. And the excess over that prior to adding this \$6,000 item being \$179,704.16, was taken into the books at the New York office? A. That is correct.

Jesse T. Mills—for Defendants—Cross.

Q. And charged to profit and loss? A. Correct. 943.

Q. So of the item of \$514,000 odd, \$334,000 odd was classified as rent and \$179,000 absorbed into profit and loss? A. Classified by the studio, as rent; not by the corporation.

Q. By which corporation? By the Producing company it was classified as rental of studio and facilities. A. By the Culver City branch of the company, the main books being kept in New York.

Q. Of the Producing company? A. Yes.

Q. And that you say had been customary for a number of years prior to 1932? A. That is right.

Q. Now, what is this additional item of \$6,462.44? A. An error in accounting of the total of \$520,000, which was written on the books. 944

Q. What do you mean by an error in accounting? That might explain almost anything. A. The \$6,462.44 is 1/52nd, I think, or 1/53rd, one or the other, of the total actual which the studio has picked up under so-called Rental of Studio and Facilities. In that year there were 53 weeks, the ordinary weeks, consisting of 52, and the fractional weeks; every four or five years an additional week has to be picked up. The studio accounts were closed at August 24, 1932, and the studio branch books only picked up 52/53rds of the total of \$346,000, or \$334,000 odd. The other item of \$6,462.44 was charged in a suspense account on the home office books in order to balance with the studio report which was closed August 24th, or a week earlier. 945

Q. So that it was carried to the 1931-1932 fiscal year rather than being charged into the 1932-1933 fiscal year? A. It did not belong in the 1932-1933 fiscal year because the \$520,000 is the actual amount of depreciation assigned by the studio.

Q. As a matter of fact, there were not 53 full weeks? A. There were not.

Jesse T. Mills—for Defendants—Cross.

946

Q. In any single year? A. No, sir.

Q. And only part of it actually applied— A. When you use the word "applied"—

Q. —in any particular year? A. That is correct.

Q. But you say that you charged the entire week into the 1931-1932 fiscal year? A. No, I only say that I charged the \$520,000 total depreciation in that year, irrespective of whether there were 52 weeks or 53 weeks.

Q. But you did charge on the basis of 53 weeks? A. No, I beg your pardon; I can't agree to that.

947

Q. It was \$520,000—53 weeks at \$6,462.44 a week? A. No, sir, it is one year; no matter whether it is 52 weeks or 53 weeks or 12 months or 13 months, it is five per cent on certain items and fifteen per cent on certain items, for the year, aggregating five hundred twenty odd thousand dollars.

Q. You have an item of \$6,462.44? A. Yes.

Q. And you made 53 weekly charges for that year? A. Yes, and the difference went into the profit and loss, whether they charge 53 or 60 it is immaterial; the total of \$520,000 is still the amount charged.

948

Q. I appreciate \$520,000 is the amount charged, but I know it was \$514,000, which we can't get away from. Now, then, let us come to this item of interest paid, \$1,559,559.79. You have introduced here a schedule, which has been marked Exhibit 10, which gives the various payments that go to make up that figure, have you not? A. I have.

Q. And those payments were made from September 30, 1931, to September first, 1932; is that correct? A. That is correct.

Q. Was this for money loaned? A. This was for money loaned.

Q. Loaned by Loew's Incorporated to which company? A. To Metro-Goldwyn Pictures Corporation.

Q. To the Pictures company? And the Pictures company, did they in turn loan it to the producing company?

A. They did.

Jesse T. Mills—for Defendants—Cross.

Q. This picture that was released here, "Letty Lynton", 949
was released about the first of May, and within a month
thereafter you had back an amount of money in excess
of the negative cost, didn't you? A. Within two months
the gross receipts from the United States exceeded the total
cost.

Mr. Pollak: Total cost, or total negative cost?

The Witness: Within two months the domestic
gross receipts exceeded the total cost.

Q. As matter of fact, by June 18th your receipts were
\$437,028.79, weren't they? A. 430 odd thousand.

Q. \$437,028.71? A. That is approximately correct.

950

Q. I was assuming that is exactly correct, because that
is from your affidavit, Mr. Mills. A. I haven't that before
me, and I am refreshing my recollection from the books
of account.

Q. Having this before you, perhaps you will concede
that that is exactly correct (handing paper to the wit-
ness)? A. That is correct.

Q. That was a month and a half after the picture was
released, and that was money actually in the till? A. It
is not necessarily actually in the till.

Q. You state here "gross receipts". A. You might as-
sume that some of that might not have been collected, that
is different from money in the till.

951

Q. As a matter of fact, you did not say it was money
that was not yet collected? A. I did not say it was money
in the till, did I?

Q. You said it was gross receipts (handing paper to the
witness). A. I will stand on the gross receipts.

Q. Since there is a distinction, will you kindly tell us
how much money was in the till by June 18th? A. I
couldn't, offhand; I would have to check on individual
accounts receivable to determine what was outstanding
on that date.

Jesse T. Mills—for Defendants—Cross.

952

Q. This was domestic, too, wasn't it, exclusive of foreign distribution? A. Yes.

Q. Was it being distributed at that time? A. Not abroad.

Q. By the 18th of June? A. By the 18th of June the first item came in on Canadian, which was only 200 odd dollars.

Q. Can you tell us from your records when the first moneys were put into "Letty Lynton"? A. No, that would be at the Coast.

953

Q. You do know, do you not, Mr. Mills, that the picture was shot in the year 1932, after the expiration of the year 1931, speaking of the calendar year? A. Yes, from my records.

Q. As a matter of fact, it was shot beginning either the 24th or 28th of February and finished either the 24th or 28th of March? A. I don't know the dates but I know it was in the calendar year 1932.

Q. It is a fact that most of the moneys put into the making of the negative, the outlay, is particularly during the shooting period? A. There is a great deal of preparatory work.

Q. I am talking about most of the money. A. I would say that most of the money is put in during the shooting period.

954

Q. Is it fair to say in this case that in less than six months all of the moneys that were put into the production of this negative were gotten back in cash? Does that give you margin enough? A. I think that is a fair statement.

Q. Within a period of six months all of the moneys put into the production of this negative were gotten back in cash. The moneys are not put in all at once, are they, Mr. Mills? A. No, sir.

Q. Nor are they gotten back all at once? A. No, sir.

Q. It is stepped up day by day on both ends? A. That is correct.

Jesse T. Mills—for Defendants—Cross.

Q. Coming back to this item of Interest Paid, \$1,559, 955
559.79, you said that was money that was advanced or
loaned by Loew's Incorporated to the Pictures company.
When were the loans made? A. At various times; it is a
running account, prior to 1932 and during 1932.

Q. Will you kindly tell us when the loans were made?
It is rather important to us; since we are paying a million
and a half interest, I think it is rather important. A. I
haven't with me the details of the account; I can say from
memory, however, that the indebtedness of the Pictures
company to Loew's Incorporated at the beginning of the
fiscal year 1932 was 29 million odd dollars. The indebt-
ness to Loew's Incorporated at the end of the fiscal year
1932 was 22 million odd dollars. 956

Q. So that the Pictures company paid back to Loew's
that year \$7,000,000 in addition to paying them interest
of a million and a half, is that correct? A. That is correct.

Q. Was any of that money used for the production of
"Letty Lynton"? A. It was.

Q. When was that advanced? A. No specific advance
was made for "Letty Lynton". This is a running account
wherein Loew's Incorporated advanced money as required
by Metro. When Metro has surplus money they repay the
advances.

Q. And it is solely on that basis that this payment of
\$1,559,000 plus of interest was paid to Loew's? A. On the
basis of actual moneys owed to them during that period,
for moneys advanced. 957

Q. What was the rate of interest? A. Six per cent.

Q. Are these loans represented by notes? A. They are
not, to my knowledge.

Q. They are just intercompany accounts? A. Yes.

Q. Added to and subtracted from as occasion requires,
from week to week, let us say, from time to time. All of
these loans were in existence prior to this fiscal year 1932,
that we are discussing? A. Yes, and for many years back.

Q. For many years back? A. From the inception of the
company.

Jesse T. Mills—for Defendants—Cross.

958 Q. You say, from the inception of the company; roughly, how far back would that take it? A. Roughly, 1920.

Q. That would take it back at least twelve years? A. At least twelve years, or prior to that.

Q. Now, as these moneys came in on the distribution of "Letty Lynton", did they remain in the possession of the Distributing company or were they turned over immediately to the Pictures Corporation? A. There was also a running account between the Distributing company and Pictures; the Distributing company turned over any surplus money they might have to the Pictures company.

Q. Periodically? A. I should say weekly.

959 Q. So that frequently, weekly, the surplus moneys in the hands of the Distributing company went back to the Pictures company? A. Correct.

Q. And did the Pictures company allow the "Letty Lynton" account any interest on these moneys that accumulated in its hands? A. They did not.

Q. They still have these moneys, haven't they? A. Which company?

Q. I suppose, the Pictures company; or have they disposed of them? A. I couldn't say that they have the moneys of "Letty Lynton" as a specific item in one account.

960 Q. But these moneys came in in 1932 and this is 1937, and they have not allowed any interest to "Letty Lynton", is that correct? A. That is correct.

Mr. Driscoll: I think that is all I want to ask Mr. Mills.

HEARING OF APRIL 23, 1937.

JESSE T. MILLS, recalled:

961

Direct examination by Mr. Pollak:

Cross examination by Mr. Driscoll:

Q. The Culver Export Corporation takes the finished foreign versions, sends them abroad, has prints made abroad by the local exchanges, and then distributes them abroad through its local offices, is that right? A. That is only true in part.

Q. What is the other part? A. We only have four countries, or had four countries where we make, strictly speaking, foreign versions. The others are all distributed from prints made from the negative made in Culver City, so-called "dubbed" versions, where we endeavor to meet the requirements of the local countries over there as well as we can without putting them entirely into their language, using sub-titles rather than oral dialogue. So that in most cases, in the bulk of the countries, the foreign version is a matter completely apart or an added item to the version so-called made in Culver City. That is why you will find in the accounting the receipts from certain specific foreign versions as distinguished from the general picture.

962

Q. Now, Culver's business is carried on through these foreign branches or subsidiaries? A. It is carried on— 963
I think that is right.

Q. It maintains this office in New York City, in the Loew Building? A. That is true.

-Q. In conjunction with the other Metro offices? A. Yes.

Q. Has Culver a separate floor or separate department? A. Separate floor or more than one floor; separate department.

Q. Have they more than one floor? A. I am not sure; I think in 1932 they were somewhat scattered. They did not have an entire floor, but what was equivalent to a floor.

964

CHARLES F. DEESEN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Mr. Cohen: This interrogation has nothing to do with the Culver accounting. It is a general interrogation as to the picture "Letty Lynton".

Q. Mr. Deesen, how long have you been with Metro companies? A. Sixteen years.

Q. What is your position? A. Manager of contract department.

965

Q. You have had that office for several years? A. Since 1931.

Q. With reference to the picture "Letty Lynton", can you tell us please how that picture was sold, under what title it was sold to the exhibitors? A. It was not sold under a title; it was sold as a star, Joan Crawford No. 2.

Q. What Production number? A. 208.

Q. So that "Letty Lynton" was sold to the trade as Production No. 208, Joan Crawford No. 2? A. Right.

Q. I show you a form of contract and ask you if the picture "Letty Lynton" was sold under that form of contract (handing paper to the witness)? A. The old production, that was later released as "Letty Lynton" on this contract - under 208.

966

Q. Under Production 208, Joan Crawford No. 2, eighth line from the top of the schedule, is that right? A. That is right.

Q. And all contracts for Production No. 208, Joan Crawford No. 2, which later came to be known as "Letty Lynton", were sold under that contract?

Mr. Driscoll: What do you mean by "later came to be known as 'Letty Lynton'"?

Charles F. Deesen—for Defendants—Direct.

Q. At the time this picture was sold it was not known 967
as "Letty Lynton"; it was known as Production No. 208.

Mr. Driscoll: You mean, on contracts taken prior to release you used the title Crawford No. 2; but on the contracts after release it was known as "Letty Lynton". Is that the fact?

Mr. Cohen: No.

Q. When were the first contracts obtained for Production No. 208, Joan Crawford No. 2? A. May, 1931.

Q. And Joan Crawford No. 2, Production No. 208, was sold until what time? A. All the time.

Q. Until the end of the 1931-1932 fiscal year? A. Yes. 968

Q. Can you tell us how many contracts were entered into for that Production No. 208, Joan Crawford No. 2? A. 7,666.

Q. Can you give us the dates upon which these contracts were entered into? A. Do you want every date?

Mr. Cohen: Starting from the first of May, 1931, up to 1934 and 1935 somewhere; do you want all those dates we have for the season 1931-1932?

The Witness: There were odds and ends we received after that.

Q. Have you a schedule prepared showing the dates upon which these various contracts were entered into? 969

Mr. Driscoll: Objected to as immaterial. I can't see what that has to do with it.

Q. Have you the schedule here? A. You have a copy.

Q. I show you this schedule and ask you whether this correctly shows the dates upon which contracts were entered into for Joan Crawford No. 2, Production No. 208 (handing paper to the witness). A. It does not represent

Charles F. Deesen—for Defendants—Direct.

970 the dates they were entered into; the week-endings, they were received at the home office.

Q. So that the dates shown on this schedule is the week ending that particular date? A. At which they were received and approved at the home office.

Mr. Cohen: I offer it in evidence.

Mr. Driscoll: I object to it as immaterial and having nothing to do with the issues.

The Special Master: I do not know exactly what it has to do, but we will receive it.

971 (The paper just offered was received in evidence and marked Defendants' Exhibit 15, of this date.)

Mr. Cohen: I also offer in evidence exhibition contract for the year 1931-1932, feature productions, that being the contract upon which was sold Production No. 208, Joan Crawford No. 2.

Mr. Driscoll: Objected to as immaterial and irrelevant to the issue.

(The paper just offered was received in evidence and marked Defendants' Exhibit 16, of this date.)

972 Q. Mr. Deesen, can you tell us the date when the Production No. 208, Joan Crawford No. 2, which came to be known later on as "Letty Lynton"—let us have the release date on that, please? A. The exact release date I could not tell you. It was May, 1932.

Q. I believe somebody swore to May 7, 1932. Prior to the release, to May 7, 1932, was this picture known under the title "Letty Lynton"? A. Yes.

Q. Was the name made public? A. Prior to release date?

Q. Yes. A. Yes, it is put on the release prior to the date of release.

Charles F. Deesen—for Defendants—Direct.

Q. Approximately how long before? A. Probably four weeks or three weeks. 973

Q. Three weeks before release? A. Yes.

Q. So that prior to, say, the middle of April, 1932, this picture was not known as "Letty Lynton", is that right?

A. Not to the public.

Q. And certainly not to exhibitors? A. Not to exhibitors, no. I want to qualify that. I don't know just how it was handled at the studio. Just what title it had on the release schedule, I don't know.

By Mr. Pollak:

Q. You mean, so far as being made known to the public? 974

A. So far as being known to the public, it was not known.

Q. Including exhibitors? A. That is right.

Q. And including those persons with whom exhibition contracts were made? A. That is right.

By Mr. Cohen:

Q. I notice the schedule just introduced in evidence, 4th line from the bottom, you have the word "red" in parentheses. What does that mean? A. At that time we found out that quite a few contracts had been returned unapproved and they were not taken off on that week ending, and later they were approved, so to make the figures just right we took off those contracts. 975

Q. In other words, you gave somebody credit for the contracts returned? A. Yes, we gave it to them twice, each time the contract came in, and it was not deducted from the figures up above.

By Mr. Pollak:

Q. And then it was written off by 108 contracts? A. That is the net figure for that week.

Jesse T. Mills—for Defendants—Recalled—Direct.

976 Q. Can you tell by looking at the schedule how many contracts were entered into prior to the release date of this picture? A. 7,315.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. You say the first contract for the sale of this picture was entered into in May, 1931? A. It was received by us and approved then.

Q. The book, "Letty Lynton" was bought in December, 1931? A. That I really couldn't tell you.

977 The Special Master: Are those years right?

Q. The picture was made in 1932? A. It is our 1931-1932 season.

Q. They were selling a year before it released the picture? A. Year and a half.

Mr. Driscoll: That is all.

Mr. Pollak: That is all.

(Hearing adjourned to May 5, 1937, at ten o'clock A. M.)

978

HEARING OF MAY 5, 1937.

JESSE T. MILLS, recalled:

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, I show you a document in two sheets, marked on the first sheet "Corporation Organization Chart.

Jesse T. Mills—for Defendants—Recalled—Direct.

August 31, 1932", and on the second sheet "Subsidiaries of Culver Export Corporation Distributing in Foreign Countries—August 31, 1932". Was the whole of this document, including certain notes thereon, prepared under your supervision (handing paper to the witness)? A. It was.

Q. And it was correct? A. Absolutely.

Mr. Pollak: I offer it in evidence.

(The document just offered was received in evidence and marked Defendants' Exhibit 17, of this date.)

Mr. Pollak: Mr. Master, with this list and chart of the corporations and corporate organization we want to explain that it is our purpose now to give a separate accounting for each corporation in this list. That does not affect, if your Honor please, the accounting of negative cost which was made out in Culver City. The same figures there obtained will reappear in the accounting to be presented in a moment for Metro-Goldwyn Pictures.

The Special Master: You are going to submit a separate accounting for each of the defendants?

Mr. Pollak: For a great many that are not defendants, including these foreign corporations.

Q. I show you a document, Metro-Goldwyn Pictures Corporation, Net Income from "Letty Lynton", and ask you if you had that document prepared under your supervision (handing papers to the witness)? A. I did.

Q. Have you a copy of that for Mr. Driscoll? A. Yes, with the supporting schedules. The top sheet is supported by the various sheets underneath (handing papers to Mr. Driscoll).

Colloquy of Counsel.

Mr. Pollak: I think, Mr. Master, it would be most convenient if we mark these present schedules as one document. The sheet on top is a complete, compendious statement of "Letty Lynton" by the Pictures Corporation. It is made intelligible by the schedules. It re-embodies in the photostat at the end the itemization of negative cost.

The Special Master: You are offering this as an exhibit?

Mr. Pollak: Yes.

(The document and supporting schedules just offered were received in evidence and marked as follows:

Defendants'

Exhibit No.	Description
18	Net Income from "Letty Lynton"
18-A	Total Distributing Expense Ratio to Film Rental Income—Year ended August 31, 1932
18-B	Home Office Expenses of Metro-Goldwyn Pictures Corp. & Metro-Goldwyn-Mayer Dist. Corp.—Year ended August 31, 1932
18-C-1	(Salaries—Year ended August 31, 1932
18-C-2	(
18-C-3	(
18-D-1)	Completed Negative Cost "Letty Lynton"
18-D-2)	
18-D-3)	
18-D-4)	
18-D-5)	
18-E-1)	Schedule A—Studio Overhead
18-E-2)	
18-F	Interest on Investment in Studio Plant and Equipment—Year ended August 31, 1932)

Colloquy of Counsel.

Mr. Driscoll: This is a substitute for the amended accounting of Metro-Goldwyn Pictures Corporation which was admitted into evidence? 985

Mr. Pollak: It largely embodies it. It supersedes it and is a complete statement of the net income from "Letty Lynton" of the Pictures Corporation.

Mr. Driscoll: Can we rely upon the completeness?

Mr. Pollak: Yes.

Mr. Pollak: I want to say this, since you put this question, that I take it that if one or two items of expense here are disallowed, but disallowed on a view which suggests that some other, perhaps lesser, allowance might be made, I assume we will have a chance to present figures on that basis as to specific items that may be disallowed, if they are. But this is a complete statement of our position with regard to this Metro-Goldwyn Pictures Corporation. 986

The Special Master: From now on we disregard this Defendants' Exhibit 3; is that what I understand?

Mr. Pollak: Yes, I think you simply disregard it.

Mr. Driscoll: That is, the amended accounting of Metro-Goldwyn Pictures was Exhibit 3, was it? 987

The Special Master: Yes.

Mr. Driscoll: And the amended accounting of Culver was Exhibit 4, was it?

Mr. Pollak: I may state that this is now being done on an entirely different theory.

The Special Master: I mean, we do not have to bother with these old exhibits at all?

Mr. Pollak: No. There is a very small explanation, while we are at it. If you will turn to Defendants' Exhibit 18-D-3 you will find that a certain figure of Miscellaneous Unclassified Expense which

Jesse T. Mills—for Defendants—Recalled—Direct.

988

is there photostated as \$3,784.61 has been changed in ink or pencil to \$1,722.07. That is because, is it not, Mr. Mills, in that item of Culver City accounting we conceded out at Culver City that the larger figure was wrong and should be \$1,722.07?

Mr. Mills: That is what I understand.

By Mr. Pollak:

Q. The photostat from which this photostat was taken contains certain crosses, is that right? A. Yes.

Q. They have absolutely no significance for any purpose? A. They have no significance to me.

989

Q. They have none. Turning to the first sheet, simply marked Defendants' Exhibit 18, the item Film Rental Income represents the entire film rental income from the United States, is that correct? A. That is correct.

Q. Of that film rental income there was actually retained by M G M Distributing Corporation 20 per cent; is that correct? A. That is correct.

Q. That was its compensation for distributing the film, is that right? A. Right.

Q. There has been some mention, I believe, at some stage of these proceedings, of a figure of 18 per cent, but the figure actually retained was 20 per cent, is that right? A. In that year, yes.

990

Q. In the year 1932? Of course this leaves the net film rental income of \$581,643.07, by a mere process of subtraction? A. That is right.

Q. The next item is Distributing Expense, 2.15 per cent of the net film rental income of Metro-Goldwyn Pictures Corporation, is that right? A. Right.

Q. Mr. Mills, how did you obtain the figure of distributing expense, 2.15 per cent? A. If you will refer to the next sheet marked 18-A you will find in the first line, Film Rental Income, excluding Canada, which is accounted for simply as \$30,020,526.08.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. Being the total rental income? A. Being the total rental income. 991

Q. Of all pictures? A. Of all pictures, in the United States, including "Letty Lynton", for the year ended August 31, 1932, as it is headed. The Distributing Corporation retained 20 per cent. of that gross income, leaving as the Pictures Corporation's net film rental income \$24,016,420.86. In the rest of that exhibit are details, with supporting schedules, of the total distributing cost of the Pictures Corporation necessary to obtain that \$24,000,000, and that expense amounts to \$516,031.63.

Q. After deducting certain items of income? A. Yes, that was net expense, after deducting certain items of income from the gross expenses, and that \$516,031.63 is 2.15 per cent. of the 24 million odd dollars net film rental to the Metro-Goldwyn Pictures Corporation. Then, since the income from "Letty Lynton" to the Pictures Corporation was \$581,643.07 compared with \$24,016,420.86 of all pictures in the year 1932, we applied the same percentage of 2.15 per cent. to "Letty Lynton" to obtain the pro rata distributing expense to the Pictures Corporation on "Letty Lynton",—that 2.15 per cent. of \$581,643.07 being equal to \$12,505.33. That amount is deducted from the net film rental, and we arrive at \$569,137.74 as net income to the Pictures Corporation on "Letty Lynton" after deducting the distributing expense applicable to that picture. 992

Q. The distributing expense of the Pictures Corporation, is that itself shown in a schedule here appearing? A. The distributing expense of the Pictures Corporation is shown on Schedule 18-A, consisting of two items of expense, less two items of income deducted from those expenses. 993

Q. The Home Office Expense of \$567,617.36, being a distributing expense, is itself shown on a schedule immediately thereafter, is it not? A. That is right, numbered 18-B.

Q. The items of salaries on that document, 18-B, marked Salaries—General, is shown by a sub-schedule, is it not? A. Yes, marked 18-C-1, 18-C-2 and 18-C-3.

Jesse T. Mills—for Defendants—Recalled—Direct.

994 Q. Turning then to Defendants' Exhibit 18-C-1, the salaries schedule, what was Mr. Feist's activity in connection with the Corporation? A. He was the general sales manager.

Q. Was he concerned with distribution of pictures? A. He was.

By Mr. Driscoll:

Q. General sales manager for the Pictures Corporation?

A. And the Distributing Corporation.

By Mr. Pollak:

995 Q. And Mr. Bernstein, what was his function? A. Mr. Bernstein was the Treasurer.

Q. Concerned with distribution? A. Right—for this amount of salary.

Mr. Driscoll: I thought the distribution was done by the Distributing Corporation and that this was an accounting of the Pictures Corporation.

The Witness: Perhaps I could clear that, Mr. Driscoll. If you will look at the bottom of 18-B you will find that these total expenses amounting to \$1,872,601.74 I show that of that amount \$1,304,984.38 was reimbursed by the Distributing Corporation, leaving for the Pictures Corporation the sum of \$567,617.36, so that this list is really a combination of expenses at the home office pertaining to the Pictures Corporation and the Distributing Corporation, which total was split roughly on a 30-70 basis.

By Mr. Driscoll:

996 Q. Is this \$1,304,984.38 reimbursed out of the 20 per cent.? A. Is this \$1,304,984.38 reimbursed out of the 20

Jesse T. Mills—for Defendants—Recalled—Direct.

per cent.? The Distributing Corporation bears that 70 per cent, against their 20 per cent. of the income; I think that is right. 997

Q. The only income the Distributing Corporation has is the 20 per cent. of the gross rentals? A. That is correct.

Q. Out of that they paid to the Pictures Corporation \$1,304,984.38? A. That is correct, and that will be accounted for in the Distributing Corporation accounting of profits on "Letty Lynton".

The Special Master: You are trying to justify now this figure of \$567,617.36; that is a net figure, isn't it, that you are trying to justify now? 998

Mr. Pollak: Yes.

The Special Master: Then you take up what you call distribution expense, but it is expenses of the Metro-Goldwyn Pictures Corporation, and the total of that is \$1,872,601.74.

Mr. Pollak: It becomes net \$567,617.36.

The Special Master: You say it is reimbursed by the Metro-Goldwyn Mayer Distributing Corporation, \$1,304,984.38, so that the net is \$567,000?

Mr. Pollak: That is right.

The Special Master: Then you begin to go into these salaries. In the Corporate Organization Chart that you have given me, you do not give the officers of these various companies, and I see these names come up time after time, and I can't figure out exactly what companies they are for. They are being paid salaries by the Metro-Goldwyn Pictures Corporation; is that the only company they are in? We know they are in some others. I think you should file a statement showing the officers of the various companies. 999

Mr. Pollak: Have you this in mind, Mr. Master? That we are claiming and proving, as we think, a

Jesse T. Mills—for Defendants—Recalled—Direct.

1000 share of the distribution expense, though not a large share, applicable to the Pictures Corporation, applicable really as a result of this system of dividing home office expenses between the two corporations, the one being wholly owned by the other, on this 70-30 basis. The fact simply was that the Pictures Corporation bore—

Mr. Driscoll: What is the 70 and 30?

Mr. Pollak: That is represented by the ratio.

Mr. Driscoll: I thought it was 80 and 20.

1001 Mr. Pollak: That is different. 80 and 20 is the division of rentals between the two, but the expenses are borne 70-30, 70 per cent. by the Distributing Corporation and 30 per cent. by the Pictures Corporation. The 70-30 ratio is represented roughly by the ratio between \$1,304,984.38 and \$567,617.36. We are now concerned with the ratio of expense.

By Mr. Pollak:

Q. Is this correct, Mr. Mills, that Exhibit 18-C-1 totals the salaries paid to those persons; it does not represent merely the 30 per cent. of salaries, as to Mr. Feist for instance, by the Pictures Corporation, but represents the payment to him? A. That is right.

1002 Q. In other words, these schedules total the \$1,872,601.74 appearing on Exhibit 18-B, do they not? A. I don't get that question.

Q. The schedules supply the details of the \$1,872,601.74 item appearing on Defendants' Exhibit 18-B, of which item there was reimbursement as to 70 per cent. leaving \$567,617.36 as the net expense? A. That is right.

Mr. Pollak: We can, of course, supply your Honor with a chart showing the corporate officers and it will show that some were officers of several corpora-

Jesse T. Mills—for Defendants—Recalled—Direct.

tions. You have in mind, of course, that these two corporations now in question, one is a wholly-owned subsidiary of the other.

1003

Q. Mr. Feist you have testified, I think, was the general manager? A. General sales manager.

Q. Mr. Bernstein was Treasurer? A. Yes.

Q. Mr. N. M. Schenck? A. President.

Q. All of those persons were concerned with the distribution of pictures? A. Right.

Q. Mr. J. Robert Rubin? A. Head of the legal department of the Pictures Corporation and Distributing Corporation.

Q. And concerned with distribution? A. Yes.

1004

Q. Mr. William F. Rodgers? A. First assistant to Mr. Feist.

Q. Mr. Howard Dietz? A. Publicity.

Q. Mr. Cohen says that Mr. Rodgers was an eastern sales manager in 1932. A. He was a distribution manager. I said, first assistant to Mr. Feist. I merely put him at the top of the list. There were four of them, district sales managers.

Q. Did he have charge of the eastern territory, if you know? A. He did.

Q. What was Mr. Connors? A. Mr. Connors was another supervisor; he was in southern territory.

1005

Q. Mr. Saunders? A. In charge of the western territory.

Q. Mr. Quimby? A. In general charge of short subjects.

Q. Mr. Bowes? A. In charge of exploitation, and dealing with music especially.

Q. And concerned with distribution? A. Yes.

Q. Mr. Bloch? A. He was in Mr. Rubin's office; I don't know his exact occupation.

Q. Wasn't he concerned with the eastern story department of scenarios? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Direct.

1006

Mr. Driscoll: I thought this was distribution.

Q. And he was assistant to Mr. Rubin? A. Yes.

Q. Mr. D. O. Decker? A. Also an assistant to Mr. Rubin, legal department; he was a lawyer.

Q. Mr. Gove? A. He was sales exploitation.

Q. Mr. Cummings? A. Sales statistics; branch accountant.

Q. Mr. Sonin? A. Purchasing department for the branches.

Q. Mr. Ferguson? A. Exploitation.

1007

Mr. Pollak: Mr. Driscoll, do you want the rest of these read off?

Mr. Driscoll: I have no desire in the matter one way or the other.

Mr. Pollak: Do you admit Exhibit 18-C-1, prima facie, subject to any correction, if you ask for it, or amplification, shows the expense of salaries of persons therein listed, concerned with distribution?

Mr. Driscoll: I will agree that prima facie it shows the salaries of some persons there listed. Whether they are concerned with distribution or not I don't know; I will not concede that. For instance, you take Bloch; what has he to do with distribution?

1008

You take Ed Bowes; he had charge of the Capitol Theatre at that time; what has he got to do with the general expense of distribution?

I will stipulate this, that it is prima facie evidence that these are salaries paid by the New York office. What I am anxious to know is this—that you are not doubling up on us.

Mr. Pollak: You can be sure of that. This is a schedule of distribution expense. If you want us to go on and testify to each one of these stenographers we will do it.

Jesse T. Mills—for Defendants—Recalled—Direct.

By the Special Master:

1009

Q. May I ask a question? These purport to be salaries paid by the Metro-Goldwyn Pictures Corporation; that is correct, isn't it?

Mr. Pollak: That is right, the Corporation paid them.

A. Either the Pictures Corporation or the Distributing Corporation.

By Mr. Pollak:

1010

Q. Isn't this the fact; that the Pictures Corporation made the payments and then was reimbursed by the Distributing Corporation? A. In some instances some of these salaries may have been paid by the Distributing Corporation direct, Mr. Pollak.

Q. If so, were they adjusted on that basis? A. They were adjusted.

Q. And these expenses were borne on the basis of 70 and 30?

The Special Master: What I am trying to get through my head is, this Defendants' Exhibit 18-C-1 purports to represent salaries paid by Metro-Goldwyn Pictures Corporation for the year ended August 31, 1932; does it represent that?

1011

The Witness: In some instances.

Q. Is it correct, Mr. Mills, that these payments there listed were in all cases made by the Pictures Corporation, yes or no? A. That is correct.

Q. These payments were themselves within the arrangement whereby as to 70 per cent, approximately of all expenses paid by the Pictures Corporation there was rein-

Jesse T. Mills—for Defendants—Recalled—Direct.

1012 bursement from the Distributing Corporation; is that right?

A. That is true.

Q. That reimbursement, I take it, was not made as to each individual payment separately, but by a statement of accounts between the two corporations, is that right? A.

Q. That is correct.

Q. Now, returning to Defendants' Exhibit 18-C-1, representing payments in all cases made by the Pictures Corporation, I ask you who Mr. William R. Ferguson was and what his function was? A. He was an exploitation man.

Q. And Mr. S. S. Braunberg? A. Legal department.

Q. I omitted H. L. Burrows; who was he? A. Publicity.

1013 Q. Mr. William D. Kelly? A. Positive prints a specialty.

Q. Used in distribution? A. Used in distribution.

Q. Mr. J. S. MacLeod? A. General supervisor of branch properties.

Q. Miss Nina Lewton? A. She was an employee in Mr. Rubin's department.

Q. Also engaged in scenario and reading of plays? A. Right.

Q. Mr. Charles E. Quick we know of but we would like to have it on the record. A. In charge of the accounts at the home office.

Q. And is he in this room at this hearing? A. Yes.

Q. And Mr. William G. Crawford? A. Publicity de-

1014 partment.

Q. Mr. Thomas Gerety? A. Also publicity.

Q. Mr. E. W. Aaron? A. Sales statistics.

Q. And an assistant to Mr. William F. Rodgers at that time, Mr. Cohen tells me; is that right? A. I didn't know that he was assistant to him; I know that his function is on statistics of sales.

Q. A. M. Holah? A. Assistant to Kelly, especially in the distribution of positive prints.

Q. Mr. James Englander? A. Publicity.

Q. William O'Brien? A. Publicity.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. All concerned with distribution? A. Entirely.

1015

Q. E. H. Brauer? A. General sales.

Q. F. E. McRoy? A. Sales statistics and collections.

Q. George W. Berry? A. He is right here. General accounting.

Q. Including, of course, accounting of receipts from distribution? A. Almost exclusively; I don't think he does much else.

Q. Mr. Joseph Flynn? A. Publicity.

Q. Mr. T. Halsey Raines? A. Publicity.

Q. Mr. William Marsh? A. Traveling auditor.

Q. William L. Engelhardt? A. Accountant.

Q. In all these cases these gentlemen are concerned with distribution? A. In all cases.

1016

Q. Pat E. Reis? A. Secretary to publicity manager.

Q. Charles F. Deesen? A. Exhibitors' contract department.

Q. William B. Jones? A. Assistant to Kelly on prints.

Q. For distribution? A. For distribution.

Q. Albert Druaux? A. Also assistant to Kelly on prints.

Q. James Pagliaro? A. Also assistant to Kelly.

Q. In like work? A. Entirely in connection with the distribution.

Q. Morris Alin? A. We will have to get information on him as to what his exact status was; I can't say from memory.

1017

Mr. Pollak: Do you want anything more specific on that?

Mr. Driscoll: No.

Q. J. H. Zimmerman? A. Traveling auditor.

Q. J. M. Cummings? A. Traveling auditor.

Q. J. R. Connacher? A. Publicity.

Mr. Pollak: Will you now stipulate, Mr. Driscoll,

Jesse T. Mills—[for Defendants—Recalled—Direct.

1018 • that this is prima facie proof of expenditures for distribution by the home office of Metro-Goldwyn Pictures Corporation, as appearing from our schedules, Exhibits 18-C-1, C-2 and C-3, being a list of salary payments?

Mr. Driscoll: I will stipulate that this is prima facie evidence of a list of salary payments made by the home office of Metro-Goldwyn Pictures Corporation.

Mr. Pollak: For the purpose of distribution?

Mr. Driscoll: Your witness will have to testify to the fact—not as to each name.

1019 Q. Can you testify, Mr. Mills, as to the whole list prepared under your supervision, being Defendants' Exhibit 18-C-1, C-2 and C-3, as to all names below the name of Mr. J. R. Connacher, that these persons were engaged upon the work of distribution and received the salaries set forth in Defendants' Exhibit 18-C-1, C-2 and C-3? Take your time and look over the lists. A. Yes, they were.

Q. Mr. Mills, it has been suggested that one or two of these persons, notably Mr. Bloch, were engaged in work that might be classified as work of production. I ask you whether all these persons whose names appear on Exhibit 18-C-1, C-2 and C-3, whether all of those persons were

1020 Q. paid the salaries above stated by Pictures Corporation, subject to reimbursement, in the manner already testified to, by the Distributing Corporation as to 70 per cent. thereof? A. They were.

Q. \$1,872,601.74 represents the cost of these expenses above listed in regard to which you have testified? A. Yes.

Q. As to which you were reimbursed by the Distributing Corporation to the extent of \$1,304,984.38, as there appears? A. Yes.

Q. Leaving the total expenses of home office of Metro-Goldwyn Pictures Corporation of \$567,617.36, in addition to the expenses already ascribed to production? A. Right.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. Returning to Defendants' Exhibit 18-A, which is an explanation of the 2.15 per cent. ratio, one item is Depreciation of Equipment, Home Office, \$14,927.54. How did you obtain that figure, Mr. Mills? A. That is 10 per cent. depreciation per annum on home office equipment costing \$149,000 odd.

1021

Q. In your judgment is that a reasonable depreciation of home office equipment? A. Yes.

Q. And it is based on your experience as an accountant? A. Yes.

Q. And specifically accounting in the motion picture industry? A. Accounting of this particular corporation.

Q. Those two show the entire expense borne by the home office in addition to the production expense; the total of \$567,617.36 and \$14,927.54 is the gross expense? A. Yes.

1022

Q. Or \$582,544.90? A. Right.

Q. From that you deduct certain income which the home office received? A. Right.

Q. I don't think Mr. Driscoll will growl about the income, but will you explain the item Trailer Income, \$50,000.08, appearing on Defendants' Exhibit 18-A? A. That is income from the National Screen Service for trailers, the use of certain parts of the pictures in trailers, which they in turn get an income on, this not being directly attributable to any one picture and, therefore, to "Letty Lynton" in itself, we have deducted it from the total expense to arrive at a lesser expense and thereby bring in a corrected figure of the total expense applicable to "Letty Lynton".

1023

Q. In other words, there was no specific income from trailers of "Letty Lynton"? A. Correct.

Q. I don't know whether the Special Master knows what a trailer is. Suppose you explain that. A. The trailer so-called is part of a picture that is to come, which you see when you go to a motion picture theatre to see a picture that you want to see and you then have to look at maybe

Jesse T. Mills—for Defendants—Recalled—Direct.

1024 two or three minutes of shots and advertising matter of the picture that is coming next week. Probably everybody has seen them. That is a trailer.

Q. In the motion picture business, when coming events cast their shadows before them, that is a trailer? A. That is right.

Q. Miscellaneous Income, \$16,513.19, is that income not specific to an individual picture? A. It is.

Q. What makes up that item? A. I have two items making up \$13,000 of the \$16,000.

Q. What are they? A. One was \$4,000 income from Canada, from the Canadian distributor, Regal Film.

1025 Q. For trailers? A. For trailers, and \$9,000 was rent received for a part of the Los Angeles branch building, whose expenses are included in the items above. That makes \$13,000 out of the \$16,000 odd. The others were comparatively minor items.

Mr. Pollak: Do you want itemization of the Miscellaneous Income of \$3,000 odd, Mr. Driscoll?

Mr. Driscoll: I am willing to accept your admission that you did get \$16,000 additional income.

Mr. Pollak: No part of which was directly ascribable to "Letty Lynton."

Mr. Driscoll: That is your testimony.

1026 Q. And, of course, by taking the \$66,513.27 from the gross expenses you get the total distributing expense of \$516,031.68? A. Which accounts for the 2.15 per cent. cost of distribution taken on the main exhibit, 18.

Q. And your "Letty Lynton", I take it, being one of the featured pictures of that year, had, in your judgment, the same proportion of distribution expense on the part of the Pictures Corporation as the other featured pictures of that year? A. Yes, it did.

Jesse T. Mills—for Defendants—Recalled—Direct.

Mr. Pollak: We have gone over Exhibits 18-C-1, 2 and 3; Exhibits 18-D-1, 2, 3 and 4 are simply embodied from the accounting already rendered, with the change already noted on Exhibit 18-D-3 of the figure \$3,784.61 by substituting \$1,722.07 as the miscellaneous unclassified expense of production. I should explain that the testimony in regard to Exhibit 18-D-1, 2, 3 and 4 was given out at Culver City, and not given by Mr. Mills. 1027

Turning now to Exhibit 18-D-5, that is a new page. It did not appear in Exhibit 3, a prior accounting Metro-Goldwyn Pictures, which accounting is now completely superseded by these documents, Exhibits 18, 18-A, B, C, D and E. 1028

The statement of Studio Overhead appearing on the first line of Exhibit 18-D-5 is detailed in Schedule A thereto attached, which is now marked Exhibit 18-E-1 and was the subject of testimony, the Master will recall, in Culver City, being studio overhead.

The item of Addition to Reserve for Continuities,—I expect to produce testimony, another accountant, from Miller, Donaldson, who is particularly expert.

The item of Income from Royalties from Music Publishers on Songs Used in Productions has already been testified to in Culver City.

Q. As to salaries paid by New York, the figure for Thalberg now appears \$151,650. That is the correct sum paid in the year 1932? A. \$151,650, that is right; that has already been testified to. 1029

Mr. Pollak: Compensation paid to Louis B. Mayer Pictures has already been testified to.

Q. That sum was actually paid? A. Yes.

Q. Paid by what corporation? A. Metro-Goldwyn Pictures Corporation.

Jesse T. Mills—for Defendants—Recalled—Direct.

1030 By Mr. Driscoll:

Q. Isn't it a fact that it was paid by Loew's? A. No.

Q. It is fixed in part by Loew's earnings. You will have to produce that contract.

Mr. Pollak: It will be testified to in detail.

By Mr. Pollak:

1031 Q. Depreciation, Los Angeles Studio, was the subject of your Exhibit 9. Now, Mr. Mills, addressing myself to the questions put to you by Mr. Driscoll—this is for the moment in the nature of re-direct examination—your figure for depreciation of the studio buildings was what figure? A. Buildings and equipment?

Q. What was the percentage you took? A. It is in Exhibit 9.

Q. Get out Exhibit 9. A. Buildings and equipment, \$520,631.21.

Q. That was based on a depreciation factor for the buildings and equipment of what percentage per year? A. 15 per cent per annum on the equipment, and five per cent per annum on the buildings.

1032 Q. Is that depreciation item, taking it first for the buildings, based on your estimate of the actual physical decomposition of the buildings, or their obsolescence in the motion picture business?

Mr. Driscoll: I object to that. I don't believe this witness has qualified himself to say what the actual decomposition of a building is in the course of a year. He is not a builder; he is an accountant.

Q. It is based on your estimate of the rate at which motion picture buildings become obsolete for the purposes of the motion picture business in a year? A. It is.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. It is not concerned, as Mr. Driscoll has already suggested, with any estimate of the rate at which a building becomes destroyed physically by time, is that correct? A. That is right. 1033

Q. I think you have already testified that it is a rate of depreciation on which you based your tax returns for the corporation, is that right?

Mr. Driscoll: That does not make any difference. I object to that. There are lots of things claimed in tax returns which we do not concede form proper deductions here. We have a benevolent government.

The Special Master: He has testified about all this. 1034

Mr. Pollak: I know that, but on cross examination Mr. Driscoll brought out that there was a different ratio of depreciation, as Mr. Driscoll thought, testified to out at Culver City.

Mr. Driscoll: What I did was to direct the Special Master's attention to the testimony that was given out there.

The Special Master: What do you want to show now?

Mr. Pollak: I want to show that what Mr. Driscoll thought was a discrepancy between the testimony of this witness and the testimony of the witness at Culver City was no discrepancy at all. The testimony of this witness is based on obsolescence for the purpose of the motion picture business. It is based on the point that buildings in the motion picture business become obsolete with new inventions and improvements. The other witness is a real estate man out in Culver City. 1035

The Special Master: He gave testimony to justify that \$334,000, didn't he?

Mr. Pollak: I don't know that the witness out in Culver City dealt with that figure at all. The

Jesse T. Mills—for Defendants—Recalled—Direct.

1036

item of Rental of Studio and Facilities, if you recall, was an item that was carried out there in accordance with some settlement or other, and it did not absorb all the studio depreciation.

The Special Master: Wasn't the testimony out in Culver City of this man Hubert, wasn't it directed to substantiate the charge of \$334,000 as depreciation rather than as rental of studio and facilities?

Mr. Pollak: It was explained, I know, that it should be depreciation.

The Special Master: Didn't he justify it by saying that you charged $11\frac{1}{2}$ per cent?

1037

Mr. Driscoll: He was talking about depreciation.

Mr. Pollak: I don't think he was addressing himself to any figure.

The Special Master: He was called for some purpose.

Mr. Pollak: He was called for this purpose, somewhat in line with what Mr. Mills is now testifying. We asked him in regard to the depreciation of buildings. Mr. Mills has given a much larger depreciation of buildings year by year; he gives a five per cent depreciation for the motion picture business.

1038

The witness out there, who was not an accountant or connected with the motion picture business at all but simply a real estate appraiser, testified that he thought that the buildings would last 66 years and gave a factor of $11\frac{1}{3}$, I think. I don't think his testimony was specific on that item or any item.

Mr. Driscoll: My impression of how that testimony out there came about was that it was approached at a different angle. At that time they were trying to show by that witness the value of the property. He had no object to make it a large percentage; his object was to make it small, and he assigned it a life of 66 years. Now they come

Jesse T. Mills—for Defendants—Recalled—Direct.

here with Mr. Mills and Mr. Mills being an accountant at this end wants to make a different percentage. 1039

Mr. Pollak: He was not an accountant at all.

Mr. Driscoll: He was an employee of the company and you put him on as an expert and qualified him as an expert. You built up a life of 66 years and now you want to knock it down.

The Special Master: Go ahead and introduce your testimony. You have got your testimony in that the buildings were worth so much and subject to a certain depreciation; now you want to show something else. Go ahead.

By Mr. Pollak:

1040

Q. Mr. Mills, is it a fact that in the motion picture business new inventions may render a building substantially useless for motion picture purposes within a relatively short time? A: It is. That was demonstrated by sound.

Q. Is it a fair estimate in the motion picture business that a building will have an average life for motion picture purposes of not more than twenty years? A. That is correct.

Q. Is it true that new inventions in the motion picture business, including installation of new equipment, will render available buildings unavailable in a short time? A. It will. 1041

Q. Now as to the 15 per cent factor of depreciation for equipment, on what is that based? A. On the actual wearing out of equipment and its obsolescence.

Q. Is the obsolescence factor an important factor in connection with the equipment? A. Very important.

Q. For reasons already stated in regard to buildings? A. Yes.

Q. But more directly applicable? A. Even more so on equipment.

Jesse T. Mills—for Defendants—Recalled—Direct.

1042 Q. Is it a fact that the coming of sound may render great masses of equipment unavailable? A. It did.

Q. Is it a fact that that has happened in your knowledge of the motion picture business? A. It is.

Q. Is it your estimate, based on your acquaintance with the motion picture business, that within a period of roughly seven years equipment uses itself up in the motion picture business? A. There is no question in my mind.

Q. Is it a standard principle of motion picture accounting, if you know, to depreciate buildings used for motion picture purposes at the percentage of five per cent a year?

A. I can't say it is a standard practice, but I know of other instances where five per cent is used.

1043 Q. In the motion picture business? A. In the motion picture business.

Q. Is there any standard as to equipment? A. I think that the standard is more than apt to be a multiple rate which will average more than fifteen per cent.

Q. That is, fifteen per cent is below rather than above? A. The average.

Q. Now, Mr. Mills, going on with Defendants' Exhibit 18-D-5 and passing on from depreciation items as to which you have testified now—as to interest paid you have already presented an exhibit on that and given your testimony concerning it, Exhibit 10? A. That is right.

1044 Q. Now, as to interest on investment in studio plant and equipment, that is marked "per schedule". That schedule is in fact Defendants' Exhibit 18-F, and I think it would be convenient, Mr. Master, if you would mark on Exhibit 18-D-5 where you see "per schedule", that it might be helpful if you would simply mark it or change it to read "per Defendants' Exhibit 18-F". (The item was amended as indicated.) Will you turn, Mr. Mills, to Defendants' Exhibit 18-F? Find on that exhibit, as the first figure, Land, \$969,240.00. What does that figure represent? A.

Jesse T. Mills—for Defendants—Recalled—Direct.

That represents the appraised value of the land as testified in Culver City. 1045

Q. By Mr. Metcalf? A. Yes.

Q. The land being land at the Culver City studio? A. That is right.

Q. Now, as to the figure, Buildings, \$3,528,251.97; what does that represent? A. That represents the actual cost of the buildings.

Q. As shown by what? A. As shown by our books and records down through the years.

Q. You have then depreciated those buildings at what rate? A. At the rate of five per cent.

Q. In accordance with the testimony you have given. Leaving a value as of August 31, 1931, for the buildings of \$2,690,097.43; is that right? A. Right. 1046

Q. Now, then, the equipment item of \$3,846,210.07, what does that figure represent? A. That represents the cost of the equipment at the Culver City studio.

Q. As shown by what? A. As shown by the books, which has not been fully depreciated.

Q. Does the \$3,846,210.07 represent money actually paid for equipment? A. It does.

Q. In all instances? A. In all instances.

Q. Whether it had been sufficiently depreciated or not you set up a reserve for depreciation of how much? A. \$2,166,959.25.

Q. And that represents depreciation at what rate? A. At the rate of fifteen per cent. per annum. 1047

Q. You then get a net figure of equipment of \$1,679,250.82? A. Right.

Q. Adding together the land value as testified to out there, and the buildings depreciated and the equipment depreciated, you get a grand total of investment in studio plant and equipment as of August 31, 1931, of \$5,338,558.25; is that right? A. Right.

Q. Now, then, you make exactly identical computations for August 31, 1932? A. Right.

Jesse T. Mills—for Defendants—Recalled—Direct.

1048 Q. Of course, carrying on your depreciation computations at the same rate for another year? A. That is true.

Q. And also representing a slightly larger investment in buildings and in equipment? A. For actual expenditures made during the year.

Q. Those expenditures were made during the year? A. Yes.

Q. Then you show an investment figure in studio plant and equipment for the year ended August 31, 1932, of \$5,014,246.95; is that right? A. Right.

Q. You find that the average investment is obtained, of course, by adding the two figures together and dividing by two? A. Yes.

1049 Q. That gives a figure of \$5,176,402.60? A. The average investment.

Q. And interest at six per cent. thereon is \$310,584.16, with which the Exhibit 18-F concludes? A. Yes.

Q. And is, of course, the figure carried on Exhibit 18-D-5? A. Yes.

Q. On Exhibit 18-D-5, that being the list of the items of expense to which you have just testified, the interest on investment in studio plant and equipment, the grand total of all these items of overhead both general studio overhead and New York salaries and other overhead at the New York office, represents your figure of \$5,891,374.57? A. That is right.

1050 Q. You allocated 1/36th thereof to "Letty Lynton", on the basis of 36 pictures produced during the year? A. Right.

Q. You have already testified, I think, that the general overhead expense of the motion picture business is incapable of being individually ascribed to special motion pictures? A. That is right.

Q. And is distributed as nearly as may be evenly among them? A. That is right.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. In your opinion is it possible to ascribe individual overhead to individual pictures, as distinguished from dividing it among the pictures? A. That is the only method by which the general overhead can be attributed to the productions produced in each year.

1051

Q. The figure of \$426,331.98 represents the total negative cost appearing in—

The Special Master: According to the computation made, is about as far as you can go. According to the computations made on this sheet, that is the total negative cost; isn't that right?

Q. Of course, as the Master put it, it is on the basis of these computations, and is the sum, of course, of the \$262,682.69 carried over from page 4 and these items appearing on Exhibit 18-D-5; is that right?

1052

Mr. Driscoll: We will concede that that is a mathematical fact.

Q. Now, Mr. Mills, I find a deduction from the negative cost of \$426,331.98, of 25 per cent. charged to Culver Export Corporation. Will you kindly explain that 25 per cent. deduction? A. The total negative cost to the Pictures Corporation is divided, 75 per cent. to itself and 25 per cent. is charged to the Culver Export Corporation who will account for their cost separately.

1053

By Mr. Driscoll:

Q. You say, "is divided"; do you mean in this account? A. Yes, and on our books we do charge Culver Export Corporation with 25 per cent. of the negative cost.

Q. That was done in 1932? A. It was, leaving the net cost of the negative to the Pictures Corporation of \$319,748.99.

Jesse T. Mills—for Defendants—Recalled—Direct.

054 By the Special Master:

Q. Let me get this straight. Who did that charging?

A. Metro-Goldwyn Pictures Corporation.

Q. Metro-Goldwyn Pictures Corporation? A. Yes.

Q. Did their books show a charge to Culver Export Corporation of \$106,582.99? A. Their books will not show that exact amount charged, because some of these items are charged directly to profit and loss as distinguished from charging it to the general overhead deferred—answering your question specifically as to whether the books will show that item.

055 By Mr. Pollak:

Q. As to these overhead items, there would be no specific charge to "Letty Lynton" as between these two corporations, naming an individual picture? A. No, that is right.

The Special Master: What amount is shown on your books as a charge to Culver Export Corporation for this picture "Letty Lynton"; has that come out in the testimony yet?

Mr. Pollak: I don't think so.

056 The Witness: The total charge actually made on the books to Culver Export Corporation for the negative cost of "Letty Lynton" was \$81,493.08.

Q. Mr. Mills, explain in your own way why the charge here to Culver Export Corporation is given as \$106,582.99, while the item on your books is an item of \$81,493.08. A. Because some of these items which we are including for this purpose as a general overhead and substantiating them as such, include certain items which were not charged on our books to picture cost and charged 25 per cent. to Culver. The interest item, among other items, was not

Jesse T. Mills—for Defendants—Recalled—Direct.

charged to negative cost and 25 per cent. charged to Culver, but was charged to general profit and loss. 1057

Q. Of course, Mr. Mills, the effect of making the charge to Culver \$106,000 instead of \$81,000 is to increase the profits of Pictures Corporation, is it not? A. That is true.

Q. And, I suppose, to diminish the profits of Culver in exactly the same amount? A. Right.

Q. Culver is a wholly owned subsidiary of Pictures Corporation? A. Yes.

Q. That gives us a total production cost of Metro-Goldwyn Pictures Corporation, including Canada, of \$391,542.24? I think you said that includes Canada? A. That excludes Canada.

Q. That item would be \$25,000 larger if instead of \$106,582.99 you charged only \$81,000 to Culver Export Corporation? A. That is correct. 1058

Q. Now, turning to Exhibit 18, you show a net income, excluding Canada, of \$177,595.50; is that correct? A. That is correct.

Q. For the United States? A. Right.

Q. It seems to me the Canadian items explain themselves. \$11,432.29 was retained by Regal Films, I think it has already been stated, by reason of a contract. That is right, is it? A. That is right.

Q. The \$12,778.34 represents the net income of Pictures Corporation in Canada, after bearing those items of expense which it bore for Canada? A. Right. 1059

Q. In relation to "Letty Lynton"? The 14 1/4 per cent., I think, has already been testified as representing the income tax at the rate paid in 1932, giving you a final figure for the Pictures Corporation profits from "Letty Lynton" of \$160,769.63? A. Right.

Mr. Driscoll: There is just one thing I would like to ask a question or two on before we adjourn today, if I may.

Jesse T. Mills—for Defendants—Recalled—Cross.

Cross examination by Mr. Driscoll:

(Hearing adjourned to Thursday, May 6, 1937, at 10 o'clock A. M.)

HEARING OF MAY 6, 1937.

JESSE T. MILLS, resumed:

Cross examination by Mr. Driscoll (continued):

Q. Mr. Mills, yesterday you offered in evidence Exhibit 18, which is a second amended accounting of the Pictures Corporation; that is correct, isn't it? A. That is correct.

Q. Now, this was prepared by you, this accounting? A. It was.

Q. And all of these figures that appear on this accounting are they on the books of the Corporation or are they what we might say synthetic figures prepared for the purpose of this accounting? A. With a few exceptions, they are on the books.

Q. Let us see if we can find some of the exceptions. Let us turn to Exhibit 18-F, if you will. You have here as of August 31, 1931, a valuation of buildings of \$3,528,251.97. Is that on the books? A. That is on the books.

Q. That is on the books? A. Yes. We have the ledger here, if you would like to see that.

Q. How did you arrive at that figure? A. Actual cost, built up over a term of years.

Q. The next item is Depreciation, \$838,154.54? A. Yes.

Q. And you arrive at that net figure, \$2,690,097.43? A. That is the depreciated figure.

Q. Does that represent a five per cent. depreciation during a period of years? A. Yes.

Q. You also put in some days ago Exhibit 9, did you not, depreciation on the Los Angeles studio? A. That is correct.

Jerse T. Mills—for Defendants—Recalled—Cross.

Q. And this 18-F that you speak of, that is the studio plant and equipment, that has to do with the same property? A. Yes. 1063

Q. On this Exhibit 9 you have studio building valuation of \$2,971,870.05, and studio building \$528,970.53 in Hollywood? A. Yes.

Q. And those come to what figure? A. Those come to a total of \$3,500,840.58.

Q. Three and a half million? A. That is correct.

Q. And that figure there is supposed to be as of what date? A. August 31, 1931.

Q. Now, I suppose you are familiar with the testimony that was taken out at the Coast; you have read the record, haven't you? A. I have read the record, part of the testimony. 1064

Q. The defendants put on the witness Metcalf out there, who testified as their expert on the valuations of lands and buildings. Do you know about that? A. No, I didn't go into that part of the testimony.

Q. Metcalf testified that the value of the land, fair market value, page 428, the fair market value of the land in 1931-1932 was \$969,210, and that is the figure you took into 18-F and also into Exhibit 9, isn't it;—or is it in Exhibit 9? No, it is not. A. No, it is not.

Q. You took that into Exhibit 18-F? A. Yes.

Q. You took his appraised value? A. Yes. 1065

Q. In fixing the value that you put on the land in Exhibit 18-F? A. That is right.

Q. Now, Lindkoltz testified as to the value of equipment and buildings. He was also produced by the defendants, qualified as an expert to tell us all about it. Let us look at the equipment for a moment, this figure in 18-F that you have for equipment—no, you have buildings on this, haven't you?

Jesse T. Mills—for Defendants—Recalled—Cross.

1066 Q. Now, you have a figure there for August 31, 1931, a basic figure of \$3,846,210.07, depreciation of \$2,166,959.25, leaving net \$1,679,250.82. A. That is correct.

Q. Is that depreciation of \$2,166,000 arrived at by deducting 15 per cent a year depreciation? A. That was 15 per cent certainly from 1931 on and probably prior to that date, within reason, at least 15 per cent; it varied slightly, if any.

Q. 18-F gives the value of your equipment as of August 31, 1931, as \$1,679,000? A. Right.

1067 Q. Now, turn again to Exhibit 9; there you give the value of your equipment, do you not, as of August 31, 1931, as \$3,224,000; is that correct? A. I do not get the \$3,224,000.

Q. You have got Culver City equipment, \$2,440,000 and studio sound equipment, \$784,000, which together make \$3,224,000? A. As gross cost.

Q. At August 31, 1931, that is the figure you have on it? A. That is the figure.

Q. \$3,224,000 as against \$1,679,000? A. No; as against \$3,846,000.

1068 Q. I don't care which. There is a difference there, too. Your net figure for 1931-1932 on Exhibit 18-F is \$1,679,000 for equipment; on Exhibit 9, you have got \$3,224,000. Now, Mr. Mills, let us look at 1932. You have got your equipment there, less depreciation, \$1,479,000, have you not? A. \$1,479,000 net value.

Q. And on Exhibit 9 what have you got after you allow your depreciation, 1932; you have got \$2,303,000, haven't you? A. I think that you have the wrong idea of what the comparative figures represent.

Q. I know what they represent. A. On Exhibit 9 you will notice that the figures used under the heading Balance in the third column, that represents the cost of the asset which is being depreciated. It does not represent the net undepreciated value with which you are comparing it when you are comparing it with the \$1,679,000.

Jesse T. Mills—for Defendants—Recalled—Cross.

Q. This figure on Exhibit 9 under column Balance represents the cost of the assets, that is after the depreciation is taken off? A. No. 1069

Q. Before the depreciation is taken off? A. On which the depreciation is to be based. That is why we take the 5 and 15 per cent figures.

Q. So that if you take \$345,000 from that \$2,303,000 you ought to get \$1,679,000? You have two items, \$227,923.31 and \$117,665.87, which together are \$345,589.18? A. I am sorry; I don't see those figures.

Q. Those figures are in the column headed Depreciation. A. That is depreciation for that year.

Q. You take those off of this \$2,303,000 and it still does not synchronize with the figures in your Exhibit 18-F? A. May I take a little time off to consult with the accountants who made this statement up under my supervision? 1070

Q. Let us go a little further before you take time off. When you are depreciating an asset at 15 per cent a year you depreciate it out entirely at the end of six and a half years? A. Six and two-thirds.

Q. So that an asset that has a value of \$2,000,000 at the end of August, 1925, would be entirely off the books in 1932? A. It would be entirely depreciated.

Q. It would not make any difference whether that asset had a million dollars or ten million dollars value in that respect, as to the remaining value in August 1932? A. That is right. 1071

Q. It would be entirely exhausted? A. That is right.

Q. So that on the question of depreciation it does not make very much difference what figure we start with as of August, 1925, to arrive at the value in 1932; isn't that true? A. All expenditures up to 1925 had been depreciated and nothing would be depreciated in that year.

Q. Let us look now at Mr. Lindholtz's testimony. He says that as for the value on the equipment, page 607, this figure was given by him as of June 30, 1925, the sound

Jesse T. Mills—for Defendants—Recalled—Cross.

1072 value was \$1,041,000 and he gave a reproduction value of \$1,888,000, for equipment. Now, then, your Mr. Craig, page 619, gave us year by year additions to equipment, and I am sure he calculated props as well, although there is no salvage in props. I would like to have you take these figures down, Mr. Mills, and see if you can reconcile these figures either with your Exhibit 9 or Exhibit 18-F.

1073 Mr. Pollak: Mr. Master, it is a perfectly settled rule, as I understand it, that you cannot cross examine one witness by references to the testimony of another witness. I do not object, if Mr. Driscoll will give Mr. Mills the time that Mr. Mills requested to make the comparison that he wanted in order to explain the relation of Exhibit 18-F and Exhibit 9. Unless that time is allowed, I do object on the ground that it is not proper cross examination.

The Special Master: He can't answer the question unless he takes the time.

1074 Mr. Driscoll: I have a perfect right to frame a question on any premises I want for the purposes of cross examination. I am not asking him as to the accuracy or inaccuracy of the expert's testimony. I am simply asking him to compare the result set forth here with these results. I have a perfect right to do that.

The Special Master: I think it is a perfectly proper question on cross examination. Of course, he should have time.

Mr. Pollak: The question of reconciling this testimony is a matter of argumentation.

Mr. Driscoll: There are some facts back of the argument that must be developed.

Q. Assume for the purpose of this question, Mr. Mills, that the sound value of the equipment as of June 30, 1925,

Jesse T. Mills—for Defendants—Recalled—Cross.

was \$1,041,000, and assume that the reproduction value was \$1,888,000— A. In 1925? 1075

Q. June 30, 1925. I am going to ask you a question based on each of those figures. You can take either one first. Assume also that between June 30, 1925, to the end of August there was added by way of new equipment new equipment, \$63,102.09; that is, 1925; and that there was added in 1926, \$147,469.86; 1927, \$163,051.32; 1928; \$100,048.25; 1929, \$352,435.58; 1930, \$310,678.95; 1931, \$366,090.77; 1932, \$155,654.41. Now, then, with that assumption, will you kindly depreciate that value at the rate of 15 per cent per year and tell me and tell the Court here whether or not the result coincides with 18-F or Exhibit 9?

1076

Mr. Pollak: The first question should be, what the result is.

Mr. Driscoll: What is the result after depreciating it at 15 per cent a year; what is the result at the end of August, 1931, and what is the result at the end of August, 1932?

A. That will take, I should say, fifteen or twenty minutes. Assuming the two bases, first of \$1,041,000 to start off, and another value is \$1,888,000, you want to get the residual value of that equipment as of the end of August, 1932.

Q. August 1931, first, and then August, 1932. This \$1,888,000 and \$1,041,000, you can disregard that for brevity and consider only your additions; then you can do it very quickly. If you figure it as of 1931 you still have a slight amount to depreciate on whichever figure you take as a base. Take it home with you and see if you can reconcile it with either of those figures. A. You can't reconcile it because it is on an entirely different base. 1077

Mr. Pollak: I would like to have an answer. You have asked him a question.

Jesse T. Mills—for Defendants—Recalled—Cross.

1078

The Witness: Do you want me to figure them out?

The Special Master: Yes.

(The witness makes computations.)

Q. Mr. Mills, I understand that you found the depreciation for the years beginning August 31, 1925, and down to August 31, 1932, to be \$1,043,673.51? A. No, sir. I found that that was the residual value of the assets put in there.

Mr. Pollak: Starting from those bases.

Q. That is the residual value of the equipment. A. That is, residual value of—

1079

Q. Depreciated value? A. —of the figures called off to me as having been stated to have been expended in these years respectively, as depreciated on a basis of 15 per cent, without taking into account anything that may have gone into it from the home office.

Q. So that the residual value on August 31, 1932, according to those figures and basing it on those figures, is \$1,043,673.51; August 31, 1932? A. Yes.

Q. And your residual value on Exhibit 9 is approximately \$2,000,000, isn't it, of equipment? A. The residual value of the equipment is \$1,679,250.82, on Exhibit 18-F.

Q. I am asking you about Exhibit 9. We will come to 18-F. It is approximately \$2,000,000? A. No, sir, that is not the residual value, but is the basic cost.

Q. You have got the figures here under the heading of Balance, you have two items that total \$2,303,000; is that right? A. \$2,300,000 odd, under two items.

Q. You have depreciation on two items? A. For the year 1932.

Q. \$345,000? A. That is for the year.

Q. So that if you take that depreciation off that balance of \$2,303,000, you have a residue of approximately \$2,000,000? A. No, sir.

1080

Jesse T. Mills—for Defendants—Recalled—Cross.

Q. What have you? A. You have the total cost of that equipment less one year's depreciation, ignoring the prior years' depreciation. 1081

Q. So that when you made up Exhibit 9 to show the depreciation you showed not the residual value but just the total cost? A. That is right; I must have.

Q. Let us come to Exhibit 18. What is your residual value shown there? A. On Exhibit 18, the residual value at the end of 1931—

Q. Of the equipment? A.—was \$1,679,250.82.

Q. On these figures that I gave you it is only \$1,043,000, or a difference of \$600,000? A. The \$1,043,000 was at the end of 1932.

Q. From Exhibit 18-F the residual value on August 31, 1932, is \$1,479,694.95? A. That is right. 1082

Q. On the figures I gave you it is \$1,043,000? A. That is correct.

Q. A difference of \$476,000? A. \$436,000, roughly.

Q. Let us pass from there to the buildings and see what the story is in regard to the buildings. Now, on Exhibit 18-F you give what purports to be the value of the buildings at the end of August, 1931, and at the end of August, 1932. Is that correct? A. That is correct.

Q. And there it is a residual; that is, a depreciated, value; it is what is left after depreciation? A. Yes.

Q. For 1931 it is \$2,690,000; is that correct? A. That is correct. 1083

Q. For 1932 it is \$2,565,000? A. That is correct.

Q. Those are your two figures? A. Yes.

Q. Now, then, Mr. Lindholtz testified—called as an expert by the defendants and he was examined by Mr. Hilborn, and he was asked the reproduction or depreciated value of the buildings as of June 30, 1925, I think—wait a minute; let me get my figures. First, what is the difference between reproduction value and depreciated value? A. The difference? I don't know what the ideas in the

Jesse T. Mills—for Defendants—Recalled—Cross.

1084. minds of the men who testified out there were, therefore I assume you want my opinion.

Q. Yes, I want your opinion. A. I would say that the reproduction value would be what it would cost to reproduce the equipment or building, whichever one is in question, at the current prices as to labor, material and so forth. What do you call the other?

Q. Depreciated value.

Mr. Pollak: Depreciated cost value.

Mr. Driscoll: I am using the term here, depreciated value.

1085. A. The depreciated value, in my opinion, would be the total cost based on the price of material and labor at the time it was put into the asset, less the amount of depreciation taken over its life.

Q. Depreciated year by year? A. Depreciated year by year.

Q. When you speak of sound value, to which do you refer; reproduction value or depreciated value? A. I am afraid I can't say much about that. I don't know what a man means by sound value. Different men might mean different things, I think.

1086. Q. Mr. Lindholtz was asked to give the value. He said, on June 30, 1925, the sound or depreciated value was \$953,000, so there he used the term "sound" as synonymous with depreciated value. Mr. Hubert was called, another expert that the defendants had on tap. Before we come to Mr. Hubert, in these figures that we have on Exhibit 18-F and on Exhibit 9, we are dealing entirely with depreciated value; we are not dealing with reproduction value? A. We are dealing entirely with depreciated cost.

Q. Depreciated cost, and they do not purport to reflect reproduction cost at all? A. Absolutely not.

Q. So that we can disregard reproduction cost here?

Jesse T. Mills—for Defendants—Recalled—Cross.

Now, Mr. Hubert testified. He was asked what the sound value was in the fiscal year 1931-1932. I am referring to page 628 of the testimony. He said that the sound value was \$2,194,000 in the fiscal year, \$2,194,000 of the buildings. You have it on Exhibit 18-F at the end of August, 1931, as \$2,690,000, which is approximately \$500,000 more, and you have it at the end of August, 1932, as \$2,565,000, which is over \$300,000 more. Is there any way that you know of that those figures can be reconciled? A. No, sir, I don't know what his figures—how he arrived at such an estimate. I know my figures are actual cost less depreciation over the years. 1087

Q. When he was asked to give the sound or depreciated value he must have had some cost figures before him, isn't that true, Mr. Mills? A. I can't say. 1088

Mr. Pollak: I object to that.

Q. Could he arrive at the depreciated value as an expert without having the cost figures before him? A. He might have estimated the cost based on his experience as an expert.

Q. You don't think Mr. Pollak would put on an expert, asking him to guess at the cost as an expert?

Mr. Pollak: I object to that question. 1089

Q. Assuming that he did have the cost figures before him, Mr. Mills, and depreciated it, and if he used the same rate of depreciation that you used he should have arrived at the same depreciated value? A. If we were both good mathematicians.

Q. And when he arrived at a less value by half a million dollars or \$300,000 he must have used a greater rate of depreciation than you used or a less cost? A. Or made a mistake.

Jesse T. Mills—for Defendants—Recalled—Cross.

90 Q. Or made a mistake. I wouldn't want to accuse him of that because you qualified him as an expert. So that the expert's testimony in regard to building cost as well as the equipment cost does not synchronize either with Exhibit 18-F or Exhibit 9? A. It does not.

Q. Do you know the figures from your books as to additions to equipment during those intervening years from 1925 to 1932? A. I haven't those here for the back years.

Q. Do you know whether or not props are included in the same account as equipment figures? A. They were.

Q. They were included? A. Props are included.

91 Q. So that this figure that I gave you, assuming that they are in conformity with the books of the company, include props as well as equipment? A. That is my understanding. Just a minute. I want to take a minute to check up on the props again. I am faking the word of the auditors and I want to be sure.

Mr. Pollak: You may check up on it.

A. (continued) I would like to withdraw or correct my answer. I will look up the handling of props.

92 Q. Mr. Mills, will you kindly check the figures I gave you from your books for additions to equipment for the years between 1925 and 1932, and for your guidance I will say that you will find it in Mr. Craig's testimony at page 619, and definitely check whether it includes props, and if it does include props give us the figures for props separate from equipment? A. For each year?

Q. For each year. A. Right.

Q. As to Exhibit 18-F and Exhibit 9, is the value of props included there in the equipment charge? A. I am quite sure they are not. But I will answer that at the same time.

Q. Will you check on that and see if they are included there? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Cross.

Q. Let me ask you this. The equipment in the home office, what does that include, Mr. Mills? A. There is no home office equipment in either of these schedules. 1093

Q. What does home office equipment include? A. The usual equipment in an office of desks and chairs and rugs and fixtures.

Q. Have you projection rooms? A. One of the rooms has projection equipment.

Q. Are there any cameras included?

The Special Master: What schedule is that on? 18-A?

Mr. Driscoll: There is home office equipment depreciated at the rate of ten per cent. a year. 1094

Mr. Pollak: He testified yesterday that the figure of \$149,000 referred to a schedule of equipment, Mr. Driscoll. The exhibit perfectly clearly shows and the testimony confirms that that item of \$14,927.54 on Exhibit 18-A is ten per cent. of the equipment in the home office, which was \$149,000. It was 10 per cent. depreciation.

The Witness: When I said it was not included in any schedule I was referring to the two schedules under discussion.

Q. The purpose of my inquiry was to find out why the difference between ten per cent. and fifteen per cent. depreciation. Mr. Mills, you use ten per cent. for depreciation for home office equipment and fifteen per cent. depreciation for studio equipment. Will you kindly tell us the basis of the distinction? A. On the average life base, which rate is based on the average expected life of each class of equipment. In the office equipment you have various items. Lots of desks will last longer than ten years and some rugs may wear out in seven years; chairs for heavy men may have to be replaced twice in ten years. We have taken 1095

Jesse T. Mills—for Defendants—Recalled—Re-direct.

096 an average of ten per cent. on the various items, being comparatively small, a total of \$150,000, as a fair measure of depreciation on office equipment. When we come to the studio equipment there are a great many varied classes of items with varied life and we have estimated 15 per cent. as being a fair average to write off the cost of all classes of the equipment.

The distinction between the ten per cent. rate and the fifteen per cent. rate I would say was due entirely to the difference in class of the assets involved, which would be much more perishable in studio equipment than in an office; it would be much more specialized.

097 Mr. Driscoll: Suppose I suspend, then, on the direction of the Special Master, and you go ahead with your direct examination.

Direct examination by Mr. Pollak:

Q. You can tell us this, Mr. Mills. Both Exhibit 18-F and Exhibit 9, as to both buildings and equipment, are based on a depreciation of actual investment; is that right?

A. That is right.

Q. And they rest upon the figures of cost of buildings and equipment? A. Less depreciation.

098 Q. Less depreciation? A. That is correct. And those two statements will be reconciled at the next hearing.

Q. They do not represent any estimate of the value of the buildings as at any given time? A. That is right.

Q. Or of the value of the equipment at any given time? A. Correct.

Q. By value of course I mean market value. A. They are cost less depreciation.

Mr. Pollak: I offer in evidence accounting of Metro-Goldwyn-Mayer Distributing Corporation, Net

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Income from "Letty Lynton", consisting of six pages. 1099

The Special Master: Received as Defendants' Exhibits 19, 19-A, 19-B, 19-C, 19-D, 19-E.

Q. You have a copy of Exhibit 19 before you with its supporting schedules? A. Yes.

Q. As the first item I find the figure \$727,053.84. That is the figure as to which testimony has already been given in connection with the Pictures Corporation as being the total domestic rental income, is that right? A. That is right.

Q. Domestic, excluding all strictly foreign business and also all business not in the continental United States?

A. That is right.

1100

Q. You have already testified that the income was divided 80 per cent. to Pictures Corporation and 20 per cent. to the Distributing Corporation, and that explains, of course, the deduction from the \$727,000 of the figure of \$581,643.07, which we have had in the other accounting?

A. That is right.

Q. Leaving as the Distributing Corporation's 20 per cent. share, \$145,410.77. We now come to the expenses. The distributing expense is the subject—you can just answer this in a general way, yes or no—of schedules that appear attached? A. Yes.

Q. Turning to Schedule 19-A, that refers under the heading Distributing Expense to Home Office Expense, per Schedule. I will turn to that schedule, which is Exhibit 19-B. These are the same expenses that have already been testified to in relation to the Pictures Corporation? A. They are.

1101

Q. Where you say there on Exhibit 19-B, Salaries, General, per Schedule, I think we ought to put in there Exhibit so-and-so. It is part of Exhibit 18. A. I have it right here; Exhibits 18-C-1, 2 and 3.

Q. It is those three pages of salaries? A. Yes.

(The Exhibit 19-B was marked as indicated.)

MICRO CARD

TRADE MARK **®**

22

39

1411



65



Jesse T. Mills for Defendants—Recalled—Re-direct.

1102

Q. All the items on 19-B are items which appear in connection with the Pictures Corporation and as to which you have already given testimony? A. They are:

Q. When you say, "Absorbed by Metro Goldwyn Pictures Corporation, \$567,617.36," you refer, do you not, to the fact that the Pictures Corporation bore 30 per cent of the expenses? A. Roughly; that is the exact amount.

Q. That is the exact amount that it did bear? A. Yes.

Q. I now come to Exhibit 19-C. Will you tell us what this represents? A. 19-C is an analysis by branches and by classification of expenses of the various items of expense in all of the branches.

1103

Q. Of these expenses of the branches of the Distributing Corporation did the Pictures Corporation bear any share?

A. They did not.

Q. These items of expense are drawn from your books, are they, appearing on 19-C? A. They are the result of the books.

Q. In all cases? A. In all cases.

Q. Taking as an illustration Albany, the total is \$76,293.74. Does the \$6,708 represent the salary paid to the manager in that city? A. It does.

Q. The manager being of course the manager of the distributing? A. That is right.

Q. The Salesman total is their salaries, is that right?

1104

A. That is correct.

Q. The item heading "Others" — A. Under "Salaries"?

Q. Under "Salaries" — A. Other salaries; salaries other than managers or salesmen.

Q. Salaries of other employees at the branch? A. Yes.

Q. What does the item Exploitation represent, \$1,070.69? A. Expenses by the Branch in the exploitation of pictures in general.

Q. They reported their expenses to you? A. Oh, yes, and they are reimbursed by the home office and charged up to this account.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Q. And Traveling? A. From this heading, it is all of the traveling expenses. 1103

Q. From the Albany branch? A. Originating in the Albany branch.

Q. Rent, Light and Heat explains itself, I take it. It is the rent, light and heat in the Albany branch? A. That is right.

Q. Express and film delivery? A. That explains itself.

Q. It is expenses they had after delivery had been made to them? A. It is delivering film to the exhibitors; and accessories.

Q. They may have received the film from some central place and then made delivery? A. Yes.

Q. Telephone and Telegraph; Postage; they explain themselves. What is Checking and Clocking? A. That is checking the gross receipts of theatres where the film is shown on a percentage basis, sometimes on a percentage of business that is done and sometimes on the basis of net receipts after expenses. Clocking is of the same nature as checking. 1100

Q. Explain the clocking. A. Clocking is to check up the actual attendance in theatres. If we have a situation where we know that the price of admission is fifty cents and they report gross receipts of a certain amount of money, by clocking people in at the door during the rush hours and all that sort of business it enables us to verify within reason the total amount of the income. The technical meaning of the word "clocking" refers to the fact that a man has a little implement that he punches every time a person passes, and that records the total number of people that have gone by in a certain length of time. 110

Q. To whom was that money paid for the clocking? A. Employees and outsiders that we engaged in that capacity.

Q. Did you also employ a service for that purpose? A. At times there is a special service employed for the checking and clocking.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1108 Q. What is the name of the service? A. Ross Federal Service, Inc.

Q. Does that operate in many places? A. It does. I find now that it did operate at that time in all of the branches. I did not state that at first because I thought it was only in part of them.

Q. Are they generally employed in the motion picture business by other distributors as well as yourselves? A. They are. All distributors use the same method.

Q. Stationery and Supplies explains itself, and I think Alterations, Repairs etc. do. A. That is right.

1109 Q. Film Maintenance and Repairs; that means what, Mr. Mills? A. Where any expenses apart from salaries are incurred in the upkeep of the film.

Q. Stationery and Supplies, that means the stationery and supplies of the several branches? A. That includes all the stationery and supplies paid for by the branches.

Q. And is distinguished from the stationery and supplies item of the home office to which you testified? A. Entirely separate.

Q. And also distinct from the item to which you also testified yesterday of certain expenses for the shipment of supplies from the home office to the branches? A. Yes; all items in this statement are entirely distinct from those yesterday.

1110 Q. And are borne by the branches? A. Yes.

Q. Taxes, local and state, I suppose those are mostly property taxes? A. It would be more personal property taxes and license fees of different nature.

Q. Advertising in the apparently few instances where there was advertising, means advertising by the branches of the productions as a whole? A. It means advertising by the branches in the case of small items. I see an item of \$10 of one branch. I assume that might be advertising such as advertising for help, and might include any form of advertising that they paid for.

Q. Projection Expense? A. Projection Expense is in

Jesse T. Mills—for Defendants—Recalled—Re-direct.

the main the expense of maintaining projection machines in the branches for the showing of pictures. In some cases they might rent another place in addition to the branch proper. 1111

Q. Did the branches in some instances in 1932 have projection machines of their own which they showed pictures to exhibitors? A. They did.

Q. That would have to be purchased or maintained? A. Maintained.

Q. General expense, can you give us a general idea of general expense? A. Of course, it is everything that is not specifically specified under descriptive headings, and will include almost any item that can be imagined in the way of car fares and other items. 1112

Q. Minor supplies, I suppose? A. Minor supplies and almost anything that is not included in the other captions.

Q. I notice even supper money is taken out. I suppose that is money paid men for working overtime? A. Yes.

Q. These items naturally vary in amount for the several branches. Were they in character the same in all instances and does the testimony you have given about them apply to them? A. It does apply as to instances where we have shown in general the character is the same.

Mr. Pollak: Do you accept, Mr. Driscoll, Exhibit 19-C as prima facie proof of the expenditures therein listed by the Distributing Corporation through its branches? 1113

Mr. Driscoll: Yes.

Q. The item of \$296,707.65 appearing on Exhibit 19-C opposite New York is an item of expense entirely distinct from that of the home office? A. Entirely distinct.

Q. The New York branch has in fact a location of its own? A. Entirely distinct from the home office.

Q. Entirely distinct from the Pictures and Distributing Corporations? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1114 Q. What is the location? A. 630 Ninth Avenue.

Q. And it was in 1932 distinct? A. Right.

Q. Turning to Exhibit 19-D, what does Exhibit 19-D represent? A. That represents the depreciation on the cost of the equipment in the various branches as listed, amounting to \$48,151.63, actually taken from the books, on actual cost.

Q. And computed at what rate? A. Ten per cent, same as office equipment.

Q. I suppose the equipment of the several branches for the most part was office equipment; is that right? A. Yes. There were also some projection machines and some little film winding machines.

1115

Mr. Pollak: Do you want further detail, Mr. Driscoll, of Exhibit 19-D?

Mr. Driscoll: Not as *prima facie* proof.

Q. As to Exhibit 19-E, Interest on Investment in Branch Office Equipment, how is that made up, Mr. Mills? A. We have taken the net undepreciated cost of the equipment in each branch at the beginning and end of the year, all as detailed on this schedule, taken the average of those two elements, arriving at a total net undepreciated investment of \$339,593.69, and taken six per cent interest on that amount, or an interest item of \$20,375.62, which is reflected on Schedule 19-A.

1116

Q. Is the word "undepreciated" correct there? A. I think so; undepreciated cost, the depreciated cost having been deducted, leaving the undepreciated cost or residual value.

Q. It is the residual cost after deducting depreciation? A. That is right.

Q. The figures in all cases of cost are, of course, drawn from your books? A. Correct.

Q. In computing the depreciation there to get your final figure, at what rate did you compute? A. Ten per cent.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Mr. Pollak: Do you accept Exhibit 19-E as prima facie proof of the fact that these investments, under the explanation given of the rate of depreciation, are the investments on which computation of interest was made? 1117

Mr. Driscoll: Prima facie, yes.

Q. Going back to Exhibit 19-A, Mr. Mills, we have gone through the schedules, but there are some things that are not scheduled. There is an item under Distributing Expense marked Franchise Offices, Expense; what does that mean? A. That represents the payment to an outside franchise holder, which existed in 1932, namely, the Philadelphia branch exchange. 1118

Q. I notice in your list of branches Philadelphia does not appear; that is correct, is it not? A. On Schedule 19-C?

Q. On the 19-C schedule. A. That does not appear as a branch because it was not a branch of the Corporation.

Q. It does appear on Exhibits 19-D and E concerned with depreciation and interest on investment? A. That is correct, because we did own the equipment in the branch and paid for it.

Q. You bought it? A. We did.

Q. What was the difference, stated in general terms, between your relationship to the Philadelphia franchise office and your relationship to what you have called branches pure and simple? A. The branches were simply a department of the company; I think that describes their relationship; while the franchise holder was in exactly the same relationship as the Regal Film Company in Canada, an entirely outside man. 1119

Q. How was he compensated? A. He was compensated by payment of his expenses plus a certain amount to him for his services.

Q. What does the \$277,000 item, in relation to that payment, mean—in relation to that franchise office? What

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1120 was it composed of? A. It was composed of his actual expenses in that branch exchange, in accordance with weekly vouchers which he would submit, including his compensation, and this amount was deducted from the gross collections of Metro-Goldwyn Pictures Corporation, and he remitted the difference to us.

Q. From the Philadelphia district? A. That is right.

Q. And the \$277,707.19 represents the amount actually retained by him? A. It does.

Q. Over and above this sum which he retained, he remitted all collections to you? A. That is correct.

1121 Q. And these are, of course, included in the gross film rental? A. The gross figures are included in the gross film rentals.

Q. Now, from a total of distributing expenses of \$4,958,525.60 you make deductions for certain receipts by the Distributing Company? A. Right.

Q. Including its branches? A. Yes.

1122 Q. Of which the largest is the sales of advertising accessories. What does that mean, Mr. Mills? A. The sales of advertising accessories, amounting to \$761,395.68, are the gross receipts in the year from the sales of advertising paper and heralds and everything of that category for which we charged the exhibitor, not segregated by pictures. It was impossible to arrive at the exact amount of advertising sales on Letty Lynton, the same as it was impossible to arrive at the exact expense on Letty Lynton in these other items of expense. Therefore, we took the net profit on advertising accessories, which was the \$761,000 mentioned, less the cost of the same, \$428,902.03, bringing in a net profit of \$332,493.65, which is the main element of the deduction from the above expenses.

Q. How was the cost of this advertising material made up? A. That is the actual cost paid to printers and lithographers for the material.

Q. In other words, the exhibitor, besides paying a rental

Jesse T. Mills—for Defendants—Recalled—Re-direct.

for specific pictures, had to pay for the advertising accessories that were supplied to him? A. That is true; they were sold to him at a profit. 1123

Q. The profit amounting, for the fiscal year ending August 31, 1932, to \$332,493.65? A. That is right.

Mr. Pollak: Now, the miscellaneous income, do you want any particularization of that, Mr. Driscoll? You are getting credit for it.

Mr. Driscoll: I am not asking for any particularization.

Q. Making a total distribution expense, after deducting income of \$339,967.11, of \$4,615,558.49? A. That is correct. 1124

Q. Now, with that as a basis, will you explain the 76.87 per cent of net film rental income, the figures represented by a ratio of this \$4,615,558.49 to \$6,004,105.22, being the net film rental income of that corporation? A. That is correct.

Q. Now, turning to Exhibit 19, you get your figure of \$111,777.26 as being an average distributing expense of the Distributing Corporation compared with the total income?

A. With the net income on Letty Lynton.

Q. The 76.87 per cent is derived as an average? A. Yes.

Q. And then you apply it to the \$145,410.77 received from Letty Lynton? A. Right.

Q. Which gives you a net income from Letty Lynton of the Distributing Corporation, before taking off Federal income taxes, of \$33,633.51? A. That is correct. 1125

Q. To which you apply the 14½ per cent Federal income taxes paid that year, and get a final, ultimate income, after deduction for Federal income taxes, of the Distributing Corporation for Letty Lynton of \$28,756.65? A. That is correct.

By Mr. Pollak:

Q. Mr. Mills, will you, in your own way, consider Exhibit 18-F and Exhibit 9, and explain whether there is any dis-

Jesse T. Mills, for Defendants—Recalled—Re-direct.

Q. Discrepancy whatever between them? A. On Exhibit 9 the base of the cost of equipment on which 15 per cent is depreciated is stated as \$1,519,489.80, and another item of \$784,291.95, making a total of \$2,303,781.75. Turning to Exhibit 18-F, that combination of figures is stated in one amount of \$3,846,210.07, showing an apparent discrepancy of \$1,542,428.32.

That \$1,500,000 odd is the amount of equipment included in the \$3,846,210.07 which had become fully depreciated at the beginning of the year 1932, and likewise the \$2,166,959.25 reserve for depreciation is the reserve for depreciation on partially exhausted equipment as well as the reserve for depreciation on the equipment which had been fully depreciated. So that this \$3,846,210.07, total cost, and the \$2,166,959.25 total depreciation, should each be reduced by the \$1,542,428.32, leaving the same net residual value of \$1,679,250.82.

To clear up a further item that bothered Mr. Driscoll; as to why I can't subtract the depreciation for the year ending 8-31-32, amounting to \$345,589.18, from the \$2,303,781.75 so-called balance at the beginning of the year, and arrive at the net value at the end of the year—is because Exhibit 9 does not show the amount of depreciation taken in the preceding years on the equipment which is still being depreciated. So that if on Exhibit 18-F we were to substitute the figures to show the cost of the equipment not fully depreciated and the corresponding reserve on that equipment not fully depreciated, we would have the cost of the equipment not fully depreciated at the beginning of the year \$2,303,781.75; reserve for depreciation on that cost, \$624,530.93; leaving a net undepreciated value of \$1,679,250.82.

Q. In other words, getting exactly the same result? A. Getting the same net result on both schedules.

Q. Isn't this correct, that in Exhibit 18-F you put in all the items of cost that appeared on your books? A. That is right.

Jesse T. Mills—for Defendants—Recalled—Re-cross.

Q. Including the items of cost of equipment wholly depreciated? A. That is right. 1129

Q. You also included, because it also appeared in your books, the depreciation on the items wholly depreciated before the year in question? A. That is correct.

Q. That is, you enlarged each figure by exactly the same amount, is that correct? A. That is right.

Q. That amount being—you have given the figure already, but just give it again. A. The amount was \$1,542,428.32.

Cross examination by Mr. Driscoll:

Q. On this Schedule, Exhibit 9, you have the wholly depreciated item of \$921,078.02. Now you tell us the item is \$1,542,428.32. A. That is correct, because \$621,350.30 represented the depreciation on the Hollywood studio equipment which had been fully depreciated prior to 1932. In the first column on Exhibit 9, where we show at August 31, 1931, \$2,440,567.82, that does not include this \$621,350.30 already deducted, because that is stated you will notice as Culver City studio equipment and you have no Hollywood equipment on that schedule, having been entirely depreciated and ignored. 1130

Q. Supposing we add this \$621,350.30, which is the Hollywood equipment which had been depreciated and charged off prior to August 31, 1931, to the figure of \$2,440,567.82, or to the figure of \$2,440,567.82 plus the \$784,291.95, how do you then reconcile them with the statement of equipment up here in Exhibit 18-F of \$3,846,000? A. I will put these figures down: \$2,440,567.82; under that I add \$784,291.95; add my stated \$621,350.30, and the total of those three figures is \$3,846,210.07, the gross cost still appearing on our books, and the gross depreciation reserve still appears there, which is the reason we used those gross figures on this 18-F, coming to the same net figure. But naturally we can't use the gross figures when we are arriving at our base for depreciation but must eliminate 1131

Jesse T. Mills—for Defendants—Recalled—Re-cross.

132 the total of \$1,542,428.32 composed of two elements, subtract from the gross book cost before we can arrive at the base to calculate the depreciation for the year.

Q. How do you reconcile that with the figures that Mr. Craig has given of additions to equipment for the years 1925 to 1932, inclusive, which you figured out would have a net value of— A. I think I was to prepare a statement from our books to see if there were any other additions that Mr. Craig did not know about that were added on the books at the home office, and to show these figures year by year which will also disclose year by year any discrepancies between Mr. Craig's figures and ours, and also to ascertain and state how the cost of props was handled and whether it was included in the figures or not.

133 Q. Now, to make this clear to myself and possibly to others, you start here on Exhibit 18-F on August 31, 1931, with a net value of \$1,679,250.82 for equipment? A. That is correct.

Q. You take a depreciation, not on the value that was in that equipment on the first of your fiscal year, but you take it upon the basic figures that were on your books prior to that? A. I take it on the basic cost of items that have not been fully depreciated.

Q. So that you are charging us, or charging "Letty Lyn-
ton", not 15 per cent. of the net value of the property of that year, but you are charging fifteen per cent. of the basic figure? A. Of the cost.

134 Q. Of the cost? A. Of the cost of the equipment which had not previously been charged off.

Q. Which as a matter of fact is about— A. That is the \$2,303,000 appearing on Exhibit 9, divided into two elements there. You get the same result.

Q. Which as a matter of fact is more than 20 per cent. of the net value at the beginning of that fiscal year? A. It might be 100 per cent. of the net value at the end of the year.

Q. It is not, is it? A. I don't see any comparison.

Jesse T. Mills—for Defendants—Recalled—Re-re-direct.

Q. Now, making the comparison, I am just asking you if it is? A. Mathematically, yes. 1135

Q. That depreciation that you are charging off to "Lefty Lynton"—we are not in partnership with you—we don't care how you keep your books—you are charging off depreciation here that amounts to more than 20 per cent. of the value of this property that you had on your books at the beginning of that year. A. That is mathematically correct.

Q. And it does not gibe with the figures given by Mr. Craig, does it? A. No.

Q. One further question. The figures on your books, is it actual cost or the appraisal made by the American Appraisal Company as of June 30, 1925? A. Actual cost. 1136

Q. Then this appraisal made by the American Appraisal Company as of June 30, 1925, does not enter into this calculation at all? A. I have entered no appraisal.

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, Mr. Driscoll put to you one or two questions to the effect that the depreciation factor is more than 15 per cent. of the ultimate value as it appears at the end of the fiscal year. Am I right in this, that in computing the depreciation factor, whether it is 15 per cent or anything else, one necessarily takes a continuous factor down from the beginning.— A. You mean as a matter of book-keeping, not as a matter of accounting to some one else for profits? 1137

Q. I ask you if that is a necessary bookkeeping practice? A. It is.

Q. I ask you this: If you did not take your 15 per cent. so on an original amount, but took it over again each year on the residual amount, would you ever completely wipe out the original amount? A. You would never; you would always have a small residual value.

Mr. Pollak: I think that is all.

Jesse T. Mills—for Defendants—Recalled—Re-re-cross.

Cross examination by Mr. Driscoll (continued):

Q. Have you those ledger sheets with you on the equipment? A. Not on the prior years, Mr. Driscoll. From these here I could not answer you today as to the movements of the prior years. We have only the ledger sheets for that year.

Q. Let me ask you this, while we are about it. While you are reconciling the figures, will you kindly reconcile the fact that your basic figures of cost on Exhibit 9 on the real estate, I mean on the buildings, show \$3,500,840.58, whereas the same basic figures on Exhibit 18-F are \$3,528,251.97, a difference of \$27,000 odd? A. The total building cost on Exhibit 9 is \$3,500,840.58 on which depreciation is calculated. At the end of the year 1931 we had a separate account of \$27,411.39, representing construction work in progress which for depreciation purposes was not taken because it had not been completed, but was included in the cost of the buildings to go on Exhibit 18-F.

Q. So you used one base for Exhibit 9 and another for Exhibit 18-F? A. I used the reduced base in calculating my depreciation.

Q. I mean on cost. A. On cost, yes.

Q. The two bases differ by 25 or \$28,000 on those two things. A. I used the completed cost of the buildings for the purpose of depreciation and did not include the \$27,000 work in progress, figuring that had not started to depreciate yet.

Q. What was that? A. The total figure on Exhibit 18-F of \$3,528,251.97 is correct as to buildings completed and in progress. When I came to arrive at the basis for depreciation of five per cent for that year, I reduced that amount by \$27,411.39, since that construction work during the year had not been completed and was not subject to depreciation.

Q. Have you any check or any records that show whether or not all these buildings are still standing, that you are

Jesse T. Mills—For Defendants—Recalled—Re-re-cross.

depreciating in this way? A. I have not the records to show the present status of the physical buildings. 1141

Q. So you do not know whether these buildings that you are charging off against this accounting are standing or not standing? A. That is correct; that is why we use the five per cent. As I stated, we have a common rate of five per cent on buildings and 15 per cent on equipment, which we consider to be the average useful life of the asset, being composed of a great many elements and various classes of buildings as well as various classes of equipment.

Q. I suppose that it is also true that you have no record to show whether or not this property is being used, these various buildings, all of them, and all of the equipment? A. I have no record here. 1142

Q. Have you any record anywhere? A. It could be obtained from the Coast.

Q. These figures that you have given on Exhibit 18-F as the undepreciated value of the real estate, land and buildings, as of August 31, 1931, and August 31, 1932, are considerably in excess of Hubert's valuations for these respective dates, aren't they? A. Apparently.

Mr. Pollak: This witness is not putting any estimate on the value. It is not fair cross-examination. The two witnesses were not testifying to the same thing; they were testifying to two quite different things. I object to it. 1143

Mr. Driscoll: Your Honor has the point.

Mr. Pollak: The witness there was testifying to values of the property, the buildings and equipment. He was testifying to the values in the particularly depressed year of 1932 which I believe was the very trough of the depression. This witness is testifying from the books to the actual investment.

Mr. Driscoll: Of course, this witness's testimony is the basis of your endeavor to charge against the

~~Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.~~

1141 receipts of this picture depreciation; that is what we are discussing; and whether or not as a practical matter and not as a bookkeeping, theoretical matter you are entitled to charge against us depreciation on half a million dollars of value that did not exist in 1932, I say you can't as a matter of law. I don't care anything about bookkeeping.

Mr. Pollak: We are entitled to charge interest on the investment that was made. We are also entitled to charge off depreciation. Those are propositions of law, Mr. Driscoll.

Mr. Driscoll: I understand that.

1145 Mr. Pollak: For those propositions it is necessary to get bases in fact showing what the investment was and what the depreciation was. Those bases have been given by this witness.

Re-direct examination by Mr. Pollak:

Q. There was an elaborate attempt to show some contradiction between two exhibits introduced, and there was no contradiction. I want to ask you one question. It is true, of course, that Exhibit 9 is a depreciation schedule? A. Yes.

Q. Exhibit 18-F is an investment schedule? A. Right.

1146 Q. The \$27,000 odd represented by buildings under construction, of course, was an item included in investment? A. Yes.

Q. And, therefore, appearing on Exhibit 18-F? A. Right.

Q. Your practice is not to depreciate on buildings under construction, is that right? A. That is right.

Q. It was, therefore, not included in Exhibit 9? A. Right.

Mr. Pollak: Anything further, Mr. Driscoll?

Mr. Driscoll: No.

(Discussion off the record.)

Jesse T. Mills—for Defendants—Recalled—Re-ex-direct.

Q. Mr. Mills, as I think I have already stated to the Master, for Pictures and Distributing you took the year 1932 for computing profits? A. For computing the comparison of cost of distribution to gross receipts.

1147

Q. As to Culver and its subsidiaries you took what year? A. The year 1933.

Q. Will you explain why? A. Yes.

Q. First, by the year 1932 you mean the fiscal year, is that right? A. Ending August 31, 1932.

Q. And by the year 1933 you mean the fiscal year ending August 31, 1933? A. Ending August 31, 1933.

Q. Will you explain why you took the year 1932 in the case of the Distributing Corporation? A. Because the majority of the income of "Letty Lynton" came in in that year and, therefore, that year's results of operations on the pictures was more of a representative year to arrive at a pro rata expense on account of "Letty Lynton" than any other year could be.

1148

Q. You said "the majority"; it was about 80 per cent, is that right? A. Roughly about 80 per cent. I may have the exact figures (examining paper). I haven't the exact figure, but it was roughly 80 per cent of the domestic income of "Letty Lynton" came in in the fiscal year 1932; therefore, we took out total operations for the year 1932 to arrive at a fair percentage of distribution cost.

Q. Now, the case of Culver, in the year 1933, roughly, what percentage of the foreign income from "Letty Lynton" came in? A. Roughly 80 per cent of the total income from foreign on "Letty Lynton" came in in the fiscal year 1933. The foreign always coming in much later than domestic income. Therefore, to arrive at a proper percentage of the cost of distribution, we used our figures for 1933, in the case of foreign.

1149

Mr. Pollak: Is there any objection to that practice, Mr. Driscoll?

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

1150

Mr. Driscoll: I don't know, frankly. You haven't offered any schedule showing when the respective contracts were made. I can't tell. You may have had a terrible year, one of those two years, and a very good one the other year.

Mr. Pollak: The only way of altering it would be by an elaborate percentage of weighting.

Mr. Driscoll: You haven't even shown us schedules of how the contracts were made, which is a simple matter taken from your contract ledger.

1151

Q. Have you a schedule showing when the foreign contracts were made with the distributors? A. Not when the contracts were made. I have a schedule of the actual receipts of the film rentals; I have that figure before me now.

Q. The testimony is already in that the picture was released in May of 1932 for the domestic and that the great bulk of the contracts had been made not only before May but before the period of commencement of release, some two or three weeks before that; the great bulk of domestic contracts was made before the middle of April and before it was known even what play it was to be, just that it was a Joan Crawford production.

1152

Mr. Driscoll: Did you offer in evidence the other day a schedule showing when those contracts were made?

Mr. Cohen: Yes.

Mr. Driscoll: What exhibit is it?

The Special Master: Exhibit 15; that is, the domestic contracts; I don't believe there is any evidence in about the foreign.

Mr. Pollak: On the question of the fiscal years selected, 1932 as to domestic distribution and 1933 as to foreign distribution, my practical point is that if Mr. Driscoll is going to make a point of that I think

Colloquy of Counsel.

he should tell us so now. There will be considerable 1153
more accounting work to be done, in that event.

Mr. Driscoll: When you say you took the year 1932 what do you mean, the year ending August 31, 1932?

Mr. Pollak: Yes.

The Witness: Here are the figures, if they will help you. On domestic, in 1932, there was received \$681,000 in the year, which is 93 per cent. of the total. 93 per cent. of this income came in in that year.

(Discussion off the record.)

Mr. Driscoll: I am willing to pass it unless something develops at a later date that causes us to take a different position. 1154

Mr. Pollak: That is a satisfactory disposition.

(Hearing adjourned Friday, May 7, 1937, at 10 o'clock a. m.)

HEARING OF MAY 7, 1937.

Mr. Pollak: If your Honor please, this document is a statement in five pages of the Culver Export Corporation, Net Income from "Letty Lynton." I am producing it, sir, because the order of accounting does include the Culver Export Corporation. 1155

We want specifically noted, and if your Honor rules against us an exception, on the ground that the Culver Export Corporation, being solely engaged with the exception of about \$6,000 of income, in export abroad in countries in which the United States copyright law does not operate, we object to so much of that accounting and to any liability therefore as is represented by receipts from foreign distribution.

Colloquy of Counsel.

1156 The Special Master: Your objection is noted, and your exception.

The document just offered was received in evidence and marked as follows: (Defendants' Exhibits Nos., 20, 20-A, 20-B, 20-C and 20-D.)

Mr. Pollak: If your Honor please, here is another document of six pages which, as your Honor will observe, is marked "Foreign Subsidiaries—Net Income from 'Letty Lynton'".

1157 In this connection, if your Honor please, I want to raise another and somewhat more detailed objection. This is the income of the foreign subsidiaries of the Culver Export Corporation. I object to the accounting for these foreign subsidiaries on the ground that they are not named at all as defendants in the law suit nor are they named within the order of reference. Moreover, as has already appeared, the only relation of Culver Export Corporation or of any defendant in this case to these corporations is as stockholder.

1158 As to the Philippine and Porto Rico corporations, I object on the ground, as to each of them, that the copyright laws of the United States do not extend to territorial possessions not part of the American continent.

I further object on the ground that the income of these foreign subsidiaries was entirely derived from their transactions outside of the United States, the only exceptions being, as I believe, the Philippine and Porto Rico corporations, which at that time had a relation to the United States.

As to all the corporations, I also object on the separate and inclusive ground that none of them is named a defendant and none is named in the order of reference.

Colloquy of Counsel.

The Special Master: They all are wholly owned subsidiaries. 1159

Mr. Pollak: As appears from the schedule, one or two are only partially owned; the Swedish corporation, I think, was only partially owned.

The Special Master: The objection is noted, and the exception.

Mr. Pollak: And finally, sir, as to the countries having productions in the Spanish language, a list of which countries is to be supplied, I object on the further ground that the production was, in that instance, made outside of the United States, as well as the distribution.

If your Honor pleases, may I have a ruling on that objection on these various grounds? 1160

The Special Master: The objection is noted, with an exception to Mr. Pollak.

Mr. Pollak: May I have an exception to each ground of objection stated as to each country and corporation included with each ground of objection without separately enumerating them?

The Special Master: Certainly.

The document just offered was received in evidence and marked as follows: (Defendants' Exhibit Nos. 21, 21-A-1, 21-A-2 and 21-B-1, 21-B-2, 21-B-3).

The Special Master: Do I understand that your Exhibits 20 and 21 supplement your Exhibits 4, 5 and 6, or do they completely replace the previous accountings that have been made on behalf of the Culver Export Corporation? 1161

Mr. Pollak: Exhibit 4 was an accounting by Culver which is completely superseded.

The Special Master: It is completely superseded.

Mr. Cohen: 2 and 4.

The Special Master: And they completely supersede the accountings previously made?

Mr. Pollak: Taken together they show all production and all distribution of "Letty Lynton."

JESSE T. MILLS, resumed:

162

Direct Examination by Mr. Pollak (continued):

Q. Will you look at Exhibit 20, Culver Export Corporation, Net Income from "Latty Lynton." The first item is Film Rental Income by Foreign Subsidiaries, \$414,986.41. That is actually tabulated where? A. The schedules by countries supporting that will be contained under Exhibit 21-A-1, being the first column of that page.

Q. And Exhibit 21-A-1 shows, does it not, that gross rentals of the various foreign versions and also of the English version in various foreign countries; is that right?

163

A. That is true, taking into consideration the following page which details the English versions, carried as one total on that page.

Q. Now, going back to Exhibit 20: This item of \$414,986.41, based on your books, shows the total film rental income by all the foreign subsidiaries; is that right? A. That is right.

Q. That is the gross? A. That is their gross.

By the Special Master:

Q. When you say "total income by foreign subsidiaries", you mean wholly owned foreign subsidiaries? A. No.

164

Mr. Pollak: That also includes the Swedish.

Q. It does not include Canada? A. It does not, because Canada is not now included in Culver, that being included in Pictures Corporation.

By Mr. Pollak:

Q. The film rental income, direct, that represents what, Mr. Mills? A. In the main, income from the United States Navy, or steamship lines which Culver sold direct instead of through subsidiary.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

Q. The item of \$417,862.51, then, totals the entire gross receipts outside of the United States and Canada, in the whole world? A. That is correct. 1165

Q. Then the item, Less: Retained by Foreign Subsidiaries, \$142,339.84, is a total of all the retentions by all foreign subsidiaries anywhere in the world? A. That is correct, and is supported by the schedule, the fourth column of schedule 21-A-1, by countries.

Q. All these things are shown by your books, are they, Mr. Mills? A. All these things are shown by my books.

Q. Culver then received gross, the difference between \$417,862.51 and \$142,339.84, or a gross sum of \$275,522.67 from "Letty Lynton"; that is right, is it? A. That is correct. 1166

Q. Now, then, Culver had certain distributing expenses, did it not? A. That is correct.

Q. How do you compute Culver's distributing expenses? A. If you will refer to Exhibit 20-A, the next sheet on that Exhibit 20, you will note that the total film rental income from foreign sources was \$15,563,592.34.

Q. From all pictures? A. From all pictures—in the year ending August 31, 1933, which is taken as a basic year; less amount retained by foreign distributors. That \$15,000,000 for all pictures corresponds to the \$417,862.51 on "Letty Lynton" alone. Then, the amount retained by foreign distributors was \$1,933,162.64, which was the amount retained on all pictures by foreign distributors, as compared with \$142,339.84 on "Letty Lynton." Subtracting those two large figures, four million dollars odd, from fifteen million dollars odd, we arrive at the total net film rental of Culver for all pictures, \$10,630,429.70, corresponding to the net income from "Letty Lynton" by Culver of \$275,522.67 on the first page. 1167

We then find that our total distributing expense, the last figure on page 20-A, was \$484,058.15, which results—

Q. Your net-total distributing expense? A. Net total dis-

Jesse T. Mills for Defendants—Recalled—Re-re-re-direct.

1168 tributing expense—which is 4.55 per cent of the \$10,000,000 odd total income, showing that for each \$100 of income it cost \$4.55 to distribute.

Q. For each \$100 of net film income? A. For each \$100 of net film income—as a distribution cost. Therefore, we have applied the 4.55 per cent to the picture "Letty Lynton", to the \$275,522.67, the amount of "Letty Lynton" included in the \$10,630,429.70, and we arrive at a net cost of film distribution for "Letty Lynton" of \$12,536.28, which explains that figure.

1169 Q. The distributing expense of the Culver Export Corporation is made up in much the largest part of an item of home office expense, which on Schedule Exhibit 20-A is marked "per schedule". The schedule is Exhibit 20-B, is that right? A. The schedule appears on 20-B.

Q. That schedule starts off, under Home Office Expenses, with Salaries, per schedule, and that schedule is 20-C, is that right? A. That is correct.

Q. Now, I think as to the persons named on 20-C testimony has already been given as to many or most of them in connection perhaps with the 1932 accounting given by Culver. I ask you generally whether all the persons named as receiving salaries in the total sum of \$470,951.78 received salaries in fact and in the amounts therein specified from Culver Export Corporation? A. They did.

1170 Q. Were the salaries paid by Culver Export Corporation direct? A. They were.

Q. Were all those persons engaged in the distributing business of Culver Export Corporation? A. They were.

Q. As a matter of fact, it had no other business? A. They had no other business.

Mr. Pollak: Do you want, Mr. Driscoll, any further testimony concerning the persons who are set forth on Schedule 20-B and their activities, than has been given, or do you accept that schedule as prima facie proof?

Jesse T. Mills—for Defendants—Recalled—Re-re-direct.

Mr. Driscoll: I want no further testimony except 1171
such as I may elicit on cross-examination.

Mr. Pollak: So far as prima facie proof, is concerned, you want no more?

Mr. Driscoll: No.

Q. Returning to Exhibit 20-B, the rent, light and ~~heat~~ represents rent, light and heat charged to and actually paid for by Culver Export Corporation, is that right? A. That is correct.

Q. The advertising is general advertising for foreign distribution of pictures that the Culver Export Corporation sent abroad, as a whole, is that right? A. Right.

1172

Mr. Pollak: The General Expense, do you want any itemization of that, Mr. Driscoll?

Mr. Driscoll: Do you know what it is?

Q. Can you tell us what the General Expense of \$4,174.30 of Culver is? A. It is a multitude of items. We haven't the details of those items here. It can be obtained readily.

Mr. Driscoll: We will pass it.

Q. Now, we turn to Exhibit 20-D. The item of Negative Cost, English Version, 25 per cent from Metro-Goldwyn Pictures Corporation, is a figure of \$106,582.99. That is the same figure that was deducted from the total negative cost of the English version in order to get the Pictures Corporation's share? A. That is correct.

1173

Q. Being 25 per cent of the negative cost? A. Yes. I think I should call attention to the fact that these figures on Exhibit 20-D now are specific figures of "Letty Lynton," while the figures we have been dealing with have been total cost and expense.

Q. Mr. Mills, Mr. Beatty properly corrects me. When I have spoken of the French, German and Italian versions as

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

1174 having been made by Culver I was in error in reality, was I not? They were made at Culver City by the Corporation there? A. That is true. I don't think you said "made"; I thought you said Culver bore the expense.

Q. Culver bore the expense, but Culver made nothing? A. That is true.

Q. And said Exhibit 20-D shows total production cost for Culver Export Corporation of \$195,560.42? A. Yes.

Q. Which again appears, of course, on Exhibit 20, which summarizes the whole thing? A. Yes.

Q. You thereby show a net income from "Letty Lynton" of \$67,425.97 for Culver Export Corporation? A. For Culver Export Corporation.

1175 Q. Less your Federal income tax of 14½ per cent. We will now pass to Exhibit 21. A. I have a copy.

Mr. Pollak: I suppose you don't want to cross examine until you have all these in.

Mr. Driscoll: No. That is the better way to get rid of it.

1176 Q. Exhibit 21, and the accompanying Exhibits A-1, A-2, B-1, B-2 and B-3—see if this is a correct generalized statement of what Exhibit 21 and the accompanying exhibits show. Out of the amounts retained by the foreign subsidiaries, which amounts tended to run to about 35 per cent., in some instances the foreign subsidiaries themselves in general made a profit out of their retained amounts; is that right? A. That is right.

Q. And Exhibit 21 and the accompanying documents show, do they not, the amount of profits earned by the foreign subsidiaries and ascribable to "Letty Lynton" out of the retained amounts; just yes or no? A. Yes.

Q. Would you explain the basis on which that showing is made? A. You notice on Exhibit 20 that the amount retained by foreign subsidiaries was \$142,339.84. We show

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

on Exhibit 21 that same amount of \$142,339.84, being the third item on the schedule. 1177

Q. That figure is the amount retained specifically out of "Letty Lynton"? A. That is correct.

Q. By all of the foreign subsidiaries? A. Yes. Then on Schedule 21-A attached you will find, at the bottom of the third column of Schedule 21-A-1, the item \$84,260.05, being the distributing expense of all of the foreign corporations on "Letty Lynton", arrived at in the same manner as the accounting for Culver Export Corporation and Metro-Goldwyn Pictures Corporation and Distributing Corporation, by taking the gross receipts of each country from all pictures, ascertaining their gross distributing expense on all pictures, taking that percentage of distributing expense to gross income in each country, which percentage appears in the second column on the Schedule 21-A-1, which results in the actual amount of cost of distributing "Letty Lynton" on that basis. 1178

As an example, the first item, Austria, where the gross income was \$4,339.75 out of the total of \$414,986.41, it cost the Austrian company to produce that gross rental of four thousand odd dollars \$1,510.23, being 34.80 per cent. of the four thousand odd dollars; that resulted in \$1,510.23 cost of distribution in Austria. The next column 4 shows that the Austrian company retained from Culver \$1,735.91, which is one of the items of \$142,000 which was retained. Therefore, since the Austrian company retained \$1,735.91 on "Letty Lynton" and it cost them \$1,510.23 to distribute "Letty Lynton", based on the total cost, they made a so-called profit on "Letty Lynton" of \$225.68. 1179

Mr. Driscoll: Are columns 3, 4 and 5 supposed to total column 1?

The Witness: No. Column 3 is the result of the percentage, 34.80, on the base of \$4,339.75 gross rentals. After that, the gross rentals are dropped,

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

and we now have the net cost and the amount retained from Culver.

Mr. Driscoll: Column 1 is gross; column 3 is expense, as you have it set up here; columns 4 and 5 is the computation of what is supposed to be left, is it not, or which should be, should it not? The thing that bothers me is that 3, 4 and 5 do not total 1.

The Witness: No, they will not.

The Special Master: They are not meant to.

Mr. Driscoll: I understand it now.

The Special Master: Have you finished your answer?

A. (Continued.) That illustration of Austria, being the first item, applies to all of the other countries right down through to the total for Exhibit 21-A-2 whose total is brought forward onto 21-A-1; that is, the total of those various items which I have shown for Austria agree with the totals in the main Exhibit 21, and show the net profit of the foreign subsidiaries on the amount retained from Culver.

Q. Is this correct, Mr. Mills, that taking Austria as an example, the \$225.68 represents the difference between the amount retained by the subsidiary and the distribution expense, which itself is represented by 34.80 per cent. of \$4,339.75? A. That is correct.

Q. And then the \$225.68 is the net profit earned by the subsidiary? A. Yes.

Mr. Driscoll: The difference between columns 3 and 4.

Q. The same, of course, goes for all of the countries?

A. I said that.

Q. And in the case of Finland it is pleasantly noticeable that the Finnish corporation suffered a loss of one cent?

A. That is correct.

Jesse T. Mills—for Defendants—Recalled—Re-ex-direct.

Q. Now, in the case of Sweden, of course you have deducted for the minority interest of that one corporation that is not wholly owned? A. Yes, that is \$526.52, the last item on that statement, which is copied over on the main schedule.

1183

Q. The only difference between A-1 and A-2 is that A-1 shows the foreign versions and A-2 the English versions in foreign countries? A. Yes, and the total of the English versions on the second page is brought over on the first page to make the combined total.

Q. Now, Exhibit 21-B-1 shows, country by country, the itemized expense of the corporation of that country, is that right? A. And the gross income from film rental.

Q. Taking as an illustration M-G-M Argentina, the Argentine company, \$725,878.39 represents, of course, the total rental income from all pictures of that corporation in the year 1933? A. That is correct.

1184

Q. This, in other words, is designed to get a ratio for each country of expense, is that so? A. Of distributing expense.

Q. Of distributing expense, being the ratio that has already been shown as percentage figure in— A. Schedules 21-A-1 and 21-A-2, in the second column.

Q. In the second column, that is right. Now taking the Argentine company as an illustration, do they send you statements of their expenditures? A. They do.

1185

Q. The salaries of \$87,032.97, of course, those were total salaries paid by the Argentine company? A. Right.

Q. Entirely connected with distribution in Argentine? A. Yes.

Q. And shown by your books or the books of that company? A. By the books of the Argentine company and forwarded to us in statements.

Mr. Pollak: I want to ask Mr. Driscoll, do you want, in the case of these various foreign companies itemization of the salary items?

Jesse T. Mills—for Defendant's—Recalled—Re-re-re-direct.

1186

Mr. Driscoll: No, only such as I may develop on cross-examination.

Mr. Pollak: That applies to all of them?

Mr. Driscoll: Yes.

Q. As to the Traveling, Entertaining and Auto Expense, they are expenses of doing business in the Argentine? A. They are.

Q. And similarly as to other countries? A. They are.

Mr. Pollak: I suppose Mr. Driscoll does not want any itemization of those except such as he brings out on cross-examination.

1187

Mr. Driscoll: That is right.

Q. Advertising means advertising of the company of the M-G-M productions, distributed by the Argentine company, for illustration? A. Yes.

Mr. Pollak: I take it that unless Mr. Driscoll says he wants itemization on some particular point as to some item or country, we will assume that it is prima facie proof as to each item of that country.

Mr. Driscoll: The assumption is well grounded.

1188

Q. Under the heading Light, Heat, Rent, Power, Cleaning, and so forth, that represents expenses of the corporation in the particular country for these named purposes? A. It does.

Q. Printing and Stationery explains itself. A. Yes.

Q. Postage, Telegraph, Cables and Telephone explains itself. Repairs and Maintenance are like repairs items we have had before in Pictures and Distributing Corporations? A. Right.

Q. Cartage and Freight means cartage and freight incurred down there in the foreign country? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

Q. Legal and Auditing explains itself. Insurance explains itself. Commissions, which is represented in only a few countries, in a few instances salaries were paid on a commission basis? A. There were apparently various commissions in connection with the film distribution. We have the details in regard to that. 1189

Q. They were actually paid? A. They were all paid and classified under that item.

Q. As to New York Overhead Charged—Salaries and Traveling—Field Supervisors, you might tell us what that means. A. In a great many countries where we have traveling auditors and supervisors visiting more than one country and having charge of more than one country, the expenses are paid primarily from the New York office, charged to these various companies, and not included in the accounting which we have rendered of similar items by the Culver Export Corporation. 1190

Q. That is, they were borne by these several companies? A. They were.

Q. General Expenses explain themselves. Taxes, of course, means taxes paid in the several countries by the distributing companies? A. It does.

Q. Depreciation is like depreciation items we have had? A. Depreciation on equipment, generally.

Q. Do you know what rate was used or whether they varied in different countries? A. They would vary in different countries. 1191

Q. They were computed? A. Yes, and charged on their books and reports.

Q. In some instances several foreign countries had minor accounts receivable written off? A. Yes. You will notice that sometimes they resulted in a credit.

Q. That is where they were written off and then recovered? A. Yes.

Mr. Pollak: I suppose, to save time, we may assume that Mr. Driscoll's concession as to this being

Jesse T. Mills—for Defendants—Recalled—Re-re-re-directed.

prima facie proof extends to the whole schedule, subject, of course, to his right to cross-examine.

Mr. Driscoll: I think that would be a fair assumption.

Q. Exhibit 21-B-2 is exactly the same as Exhibit 21-B-1 in principle, is it not? A. It is exactly the same for an additional group of companies. It took three sheets to cover all of the companies.

Q. And similarly as to Exhibit 21-B-3? A. Exactly.

Mr. Pollak: Does your concession extend to the three pages of companies?

Mr. Driscoll: To the three sheets.

Q. Going back to Exhibit 21, that shows complete, on the basis of the exposition you have given of the exhibits which have gone in evidence, 21 and accompanying papers, exactly what the total profit of the foreign companies was on the amounts retained from the "Letty Lynton" receipts, does it not? A. Yes, that is \$58,079.79, but since Culver's share of the Swedish company was only a fraction we have taken and deducted from that total the \$526.52.

Q. That deduction you have already explained. A. Making \$57,553.27, as Culver's share of the profits.

Q. As Culver's share of the foreign corporations, retained by the foreign corporations, making deduction for the fact that in the case of Sweden one corporation was not wholly owned? A. Right.

Q. This Cost of Prints—England, appearing on Exhibit 21, will you explain that item, \$6,619.27? A. In the case of England, it is the practice on all pictures, including "Letty Lynton", that England bears the cost of their own prints, the positive prints distributed in England, while in most or practically all of the other countries Culver bears the cost of the prints. This was an expense by the English company for cost of the prints of "Letty Lynton".

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

Mr. Driscoll: That is to avoid duty. They have 1195
so many prints that it pays to send the negative,
whereas in other countries it does not pay.

Q. Will you explain Cost of Negative—Spanish Version,
\$7,638.94? A. I think that charge explains itself.

Q. In the case of the Spanish version the negative was
actually made abroad? A. Actually made in Spain.

Q. And the expenses borne by the Spanish corporation?
A. That is true, and that expense is now included in the
Spanish company's expenses and the details attached sup-
porting the cost of distribution.

Q. Nor, of course, the cost of prints—England; included 1196
in the English company? A. That is right.

Q. That gives a final net income from "Letty Lynton",
before deduction for Federal income tax, out of the amounts
retained by the foreign subsidiaries, of \$43,295.06? A.
Right.

Q. From that you deduct your Federal income tax? A.
I would like to say a word on the deduction of Federal
income tax for foreign companies. It might be asked, why
should foreign companies pay an income tax to the United
States? I understand the entire accounting of the profits
of these foreign subsidiaries out of the amount retained
is only a possible claim against Culver, and if Culver ever
is going to realize the \$43,000 when they do realize it they 1197
will have the 14½% income tax deduction the same as any
other profit.

Mr. Pollak: Now, Mr. Master, we have now ac-
counted for all the profits of production and distribu-
tion and for all of the expenses of production and
distribution, in these exhibits now in evidence. You
may cross-examine; Mr. Driscoll.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

198 Cross Examination by Mr. Driscoll:

Q. While we are on this item of Federal income tax on Exhibit 21, Mr. Mills, that is not an item that you have paid? A. We have paid part of it.

Q. \$6,277.78? A. We have paid part of it.

Q. What part of it have you paid? A. Such part as may have been received as dividends from these foreign companies that made profits.

Q. How much did that amount to? A. I couldn't tell you that without some research.

Q. Then your figure of \$6,277.78 is not an item that you have paid? A. It is not an actual item paid in that amount.

199 Q. Your contention is that you have paid whatever taxes are represented by the profits that you have actually received from the subsidiaries, is that right? A. Profits in the way of dividends.

Q. And under the law, whatever taxes you paid on the foreign income was taken as a credit against the domestic income and you have only paid the difference? A. I am sorry; I don't get that.

Q. The taxes that you paid on the foreign income abroad — A. You are speaking of Culver now?

200 Q. The taxes you paid on foreign income abroad is deducted from the taxes you paid here, and you only pay the difference? A. It varies in different countries. Some countries—

Q. We are talking about the taxes in this country. You pay a tax on foreign dividends less the tax already paid on that income abroad. A. No; less the tax that the Culver Export Corporation, for instance, would pay. If Culver when they get that dividend in has to pay a tax of 14½ per cent on each dollar of dividend, we pay no tax to the United States Government, but on the other hand you pay the tax to the foreign government. Between the two governments you may pay 20 per cent, in some countries, and only get a credit of 14½ per cent.

Jesse T. Mills—for Defendants—Recalled—Re-ré-cross.

Q. (By Mr. Pollak): But in no event less than 14½? 1201

A. That is right.

Q. (By Mr. Driscoll): This item of \$6,277.78 is allowed for any such payments? A. Yes.

Q. You have figured 14½ per cent of the income that you have set up on these schedules, is that true? A. That is true. There is no such allowance due, Mr. Driscoll.

Q. Let us turn to Exhibit 18, your second amended accounting for the Pictures Corporation. Schedules 18-B, Home Office Expense of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation. Let me understand the situation, Mr. Mills. These two corporations maintained the same suite of offices? A. They did. 1202

Q. At that time? A. They did.

Q. And were operated by the same individuals? A. Not exclusively.

Q. We will now turn, for instance, to Schedule C—then. Will you kindly tell me which of those individuals named there are employees or were at that time—my questions are directed entirely to this period 1931-1932—were employees of Metro-Goldwyn Pictures Corporation and which were employees of Metro-Goldwyn-Mayer Distributing Corporation? A. They were all strictly employees of Metro-Goldwyn Pictures Corporation.

Q. I see. A. Their salaries being paid by that corporation; that would fix their character directly as employees of that corporation. 1203

Q. And carried as such on the books of the corporation. Were there any employees at the home office— A. Excuse me. Carried as such on the books of the corporation—the statement was made here that this is a combination accounting and is later separated on a 30-70 basis.

Q. What you want to bring to my attention is the fact that you charged 30 per cent to one corporation and 70 per cent to the other? A. That is right.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

1204 Q. I thought that was fully understood by everybody. These employees are carried as employees of the Pictures Corporation on the books of the Pictures Corporation, aren't they, Mr. Mills? A. They are.

Q. Now then, are there any employees at the home office of the Pictures Corporation whose salary has not been divided 30 and 70 in this manner? A. There are none.

Q. So that we are right back where we started from; the salaries of all the employees, then, are shared by both corporations? A. They are.

Q. Distributing and Pictures? A. Yes.

1205 Q. Was your answer pointed to the fact that there might be some employees who do no work whatever for the Distributing Corporation but work entirely for the Pictures Corporation? A. No, on the contrary, a great many of the employees only do work of the Distributing.

Q. And do nothing for the Pictures? A. That is correct.

Q. Now, this rent of \$108,921.58, to whom was that paid? A. The Marcus Loew Realty Corporation.

Q. One of the Loew subsidiaries? A. A subsidiary of Loew's Inc.

1206 Mr. Pollak: It is conceded that neither the item of General Expense, \$76,550.31, nor the item of Legal, \$56,552.02, appearing on Exhibit 18-B, had any specific relation to the picture "Letty Lynton." It is explained that both items were concerned with general litigation, or problems on a general character applicable to various motion picture producers and/or distributors and affecting the industry or large parts thereof generally, and that the Pictures and Distributing Corporations bore a ratable share along with other concerns not connected with these defendants; and the figures therein set forth are the ratable shares of these defendants, and further itemization will not be called for as to these particular items.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

Q. You have on this same schedule, Mr. Mills, 18-B, an item marked Scenario, \$20,626.79, and you stated on direct examination that was compensation paid to outside readers: A. Right.

1207

Mr. Pollak: Subject to correction, as these are put down as office expenses, there is not the slightest suggestion that it was directly for "Letty Lynton." I will at this time stipulate, subject to correction, that they were not employed in reading "Letty Lynton."

By Mr. Pollak:

Q. Does Bernstein receive a salary from Loew's Inc., if you know? A. He received it from Marcus Loew Booking Agency, which is the paying agent for Loew's Inc.

1208

Q. Is that a separate corporation? A. Yes.

Q. Is it wholly owned by Loew's Incorporated? A. It is.

By Mr. Driscoll:

Q. Mr. Mills, in this Pictures Corporation accounting on Exhibit 18-D-5 you allocate this overhead 1/36th to "Letty Lynton," is that right? A. That is correct.

Q. Was that your idea? A. It was not exclusively my idea. It was developed after talking with Mr. Pollak and Mr. Cohen who were out at the Coast and secured a great deal of original information as to the actual total pictures whose production was attributable to the year 1932, based on the entire pictures taken and completed in that year and a certain percentage of other pictures which were finished during the year and a certain percentage of other pictures which were taken during the year and not completed until the following year, resulting in 36 units.

1209

Q. As an accounting proposition, overhead is usually allocated on a basis of either labor and material or sales, is it not? A. As an accounting proposition? I don't get that.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

1210

Q. Overhead is usually allocated; if it is a manufacturing overhead, it is usually allocated on the basis of labor and materials? A. On the cost of labor and material entering into production.

Q. That is the usual thing, isn't it? A. Yes, in manufacturing.

Q. The making of this picture was manufacturing, wasn't it; that is the classification you would put it in, wouldn't you? A. Yes.

1211

Q. When you allocate it on the basis of 1/36th to each picture, that means that a picture that might have cost 6 or \$700,000 by way of labor and material gets the same classification and overhead as a picture that costs half of that? A. That is true.

Q. And during the year 1932 we had certain instances of that, did we not? Let me ask you if you are familiar with Exhibit C-25 that has been offered in evidence? A. I would have to see the schedule; I don't recognize it from the number.

Mr. Pollak: It was an exhibit out at Culver City (paper handed to the witness).

A. (continued) I am not familiar with this schedule; I have only glanced at it before.

1212

Q. I will ask you to look at it, then, and maybe I can familiarize you to some extent as you go along. You have before you Exhibit C-25, haven't you, Mr. Mills? A. I have.

Q. Will you kindly look at Production No. 633, Rasputin; that had a final cost complete of \$1,019,000? A. I have it.

Q. Let us look at 615, As You Desire Me; that had a cost of \$183,000? A. No, \$183,000 seems to be cost of Night Court.

Q. Night Court, No. 614, \$183,000. A. Yes.

Q. And those two pictures, under your system of allocating overhead, would bear the same cost of overhead? A. That is right.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

Q. Just the same as a picture like "Unashamed", No. 629, which cost \$163,000, would bear the same overhead as the picture that cost \$1,019,000? A. That is true. 1213

Q. Now, you are familiar with the motion picture business, Mr. Mills. You have been in it a great many years. A. Yes.

Q. The amount of labor and material that goes into a picture is not measured wholly by the number of shooting days, is it? A. That is a fair basis to allocate—

Q. My question is, whether or not the amount of labor and material that goes into a picture is measured wholly by shooting days? A. It is not measured wholly by shooting days.

Q. For instance, looking again at Schedule C-25, Production 578, 32 shooting days, at a cost of \$539,000; and the one just above it, 577, with only 33 shooting days, at a cost of \$381,000, or about \$150,000 less although it had one more shooting day. A. That is correct. 1214

Q. And that is a frequent occurrence as you look over this list, isn't it? A. Yes.

Q. And the picture that cost \$539,000 represents more labor and material, in your opinion, does it not, than the picture that cost \$381,000? A. Yes.

Q. Will you turn to the next sheet, please. There you have, for instance, the cost of foreign versions, \$734,000 plus and there are no shooting days charged at all from which a portion of the overhead could be charged against foreign versions, isn't that true? A. There are no shooting days entered there. 1215

Q. There are no shooting days on this schedule from which this 1/36th is made up. There are no shooting days charged against that item of foreign versions of \$734,000?

A. That is apparent.

Q. And that \$734,000 represents labor and material, does it not? A. It does.

Q. And ought to share some part of the overhead? A. That seems reasonable.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

1216 Q. And you take the cost of shorts, \$110,000, there are no shooting days charged up on this schedule against the cost of shorts; is there? A. There are no shooting days; there are no shooting days noted as charged in any of these items; there are notations of how many days were spent in shooting in each of the items, but I don't find in this schedule any notation of how much was charged for each shooting day; so that for all I know there may be an allowance on this item of \$110,000 and in the \$734,000 for shooting days.

1217 Q. I will ask you this: Conceding that the cost of shorts is \$110,000, it is reasonable to say that represents a certain amount of labor and material and, therefore, ought to share in the overhead; isn't that correct? A. To that extent, yes.

Q. Considering that foreign versions cost \$734,000, it represents a certain amount of overhead, a certain amount of labor and material, and ought to share in the overhead? A. That is right, I think.

Q. And when you are making up a schedule upon which you based 1/36th allocation to the picture, there should be allowance for those items in the overhead, is that correct, as an accounting proposition? A. As an accounting proposition that sounds correct.

Q. Look at these items above on the same sheet. A. What items?

1218 Q. Take, for instance, No. 635, Hell Below; at the end of 1931 there is an investment of \$25,901. During the year there is an increase of \$39,973, but there is no shooting days charge against that, is there? A. No.

Q. None whatever. You take, for instance, Fast Life, No. 637, I think there is an increase for the fiscal year there ending 1932 at \$39,381, and there is no shooting days charge against that. A. That was apparently started in the year 1932.

Q. That was the amount expended that year? A. Yes.

Q. That represents labor and material, too? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

1219

Q. And there is no shooting days charge against that?
A. That is right.

Q. In view of these facts, Mr. Mills, would you say as an accounting proposition that taking the shooting days, from which you figured that 36 pictures were made, that it is fair, then, to take $1/36$ of the overhead and allocate it to each picture—as an accounting proposition, I am asking you as an accountant, Mr. Mills, whether you think that is a fair allocation of the overhead. A. I think the proper allowance should be made for these additional items of production below the line showing the total of 14,994—that a certain allowance should be made for these other items, before dividing by 36.

1220

Q. I will ask you this, Mr. Mills: As an accountant, isn't it a much fairer proposition to make this allocation of overhead on this labor and material which is represented as near as can be by the final cost or by the cost put into the picture during the year? A. Not the total overhead to be charged to the studio. Should I elaborate on that?

Q. Yes, elaborate; go ahead. A. It is not fair, or you don't get a correct allocation of cost, in my opinion, if you only consider one or two elements which go to make up your allocation of expense to income. One picture which cost \$200,000 negative cost may gross a million dollars; another picture which cost \$800,000 may gross a million dollars—I say, may; they do. We have these very large discrepancies between cost and income constantly. If we had a complete list of eventual income from these various productions in which we have a complete negative cost here, we would find that they would not vary with the cost of production. Therefore, taking all of these elements together and the fact that a great deal of this overhead should be attributed to productions as such irrespective of the eventual actual investment of labor and material in the production, we would still have a total of 36 productions to divide the overhead into.

1221

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

1222 Q. Now, Mr. Mills, we started off, did we not, with the agreement between us, you and myself, that production was one thing, or manufacturing, and sales was another. That is true in any business, isn't it? A. Yes, in this business.

Q. In this particular case you have charged up, allocated, the overhead on the basis of 1/36th or per picture basis?

A. Yes.

Q. You have allocated the overhead of the sales on an entirely different basis? A. On sales? I have allocated my cost of distribution on an entirely different basis?

Q. Yes. A. Yes.

1223 Q. So that when you allocate your overhead you do not take into consideration that a picture costing \$200,000 may gross a million dollars, and one costing \$800,000 may gross a million dollars, and that, therefore, to set them right here you would have to have the gross receipts; you didn't take that into consideration in making up these schedules? A. The cost of distribution?

Q. In other words, Mr. Mills, you took and allocated your manufacturing overhead on a per picture basis; you allocated your distribution overhead on a percentage basis? A. Yes; the cost of distribution was based on receipts; that is a common practice in the motion picture business.

1224 Q. As common practice in almost any industry it is usual and ordinary to allocate overhead of selling on gross receipts, isn't it, regardless of what it cost to make the thing? A. That is right.

Q. And when you allocate the cost of manufacturing you allocate it on labor and material, as an accounting practice? A. As an ordinary practice, unless other elements enter into it.

Q. So that when you just answered a question a moment ago you said that you could not say that it could be so allocated on this cost here, because one picture costing \$200,000 might gross a million dollars and one picture

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

costing \$800,000 might gross a million dollars; in other words, you wanted to confuse the selling end with the manufacturing end of it? A. I don't want to confuse anything.

1225

Q. Why did you put in this condition about a picture costing \$200,000 grossing a million dollars and another costing \$800,000 grossing a million dollars; why is that necessary in order to allocate this overhead of manufacturing?

A. Because the overhead which has not been heretofore allocated, \$5,000,000 odd as I remember the figure, is an overhead expense which is not concerned with the actual expenditure at the studio of these respective items. As I understand, the \$900,000 item as additional compensation paid to Louis B. Mayer Pictures in addition to their salary was payable to them on an earning basis, the entire idea of the formula by which this \$900,000 odd is arrived at was based on a profit; that if they made profitable pictures they were to get a percentage of that profit; if their pictures were not profitable they would be correspondingly reduced in their remuneration. I think you will find there are other items of \$1,500,000 interest in that overhead total not previously allocated to pictures, which is based on other elements than the individual assigned cost of labor and material in each individual picture. That is my reason for saying that in this instance, when I am allocating a large amount of general overhead, that it is not fair to only consider one of the elements, but all of the elements should be considered.

1226

1227

Q. Now, will you kindly explain a little further, Mr. Mills, and show me how, in arriving at 1/36th for each picture because there were 36 pictures, you were influenced by the fact that one picture costing \$200,000 may have grossed a million dollars and another costing \$800,000 may have grossed a million dollars, how that varied the formula you eventually adopted of 1/36th? Did it? From 35 to 36 or from 37 to 36? A. No, that 1/36th was arrived at by taking 36—

Jesse T. Mills—for Defendants—Recalled—Re-re-cross.

1228

Q. 36 what? A. By taking the approximate number of pictures completed in the year, of 36 units, not completed pictures but 36 units of completed pictures, as being the fairest method of allocating this total overhead not heretofore assigned to pictures.

Q. How did the gross receipts modify that in any way?

A. The gross receipts modified it in that it showed that the values of these pictures were not measured by their respective costs.

Q. You mean that is an argument that might justify your 1/36th formula, don't you? A. No, I don't mean that.

1229

Q. When you arrive at 36 you are dealing entirely with the production end? A. I am dealing with the—

Q. Where did you get 36? A. It was the figure that I understood that they had arrived at in the examination at the Coast of the number of picture units produced in the year.

Q. So that you are dealing with the production end when you fix 36? A. I am allocating it to production as distribution of production cost.

Q. If it had been 40 pictures produced during the year, it would have been 1/40th? A. Yes.

Q. So that you are allocating it on a per picture basis produced during the year? A. Yes.

1230

Q. So that you are dealing entirely with the production end, isn't that true? A. I am afraid that is a conclusion, isn't it?

Q. I am trying to have you conclude that. Isn't it true?

A. I will have to think about that a little bit. I think I am dealing with other elements than the strict production end attributable to the original cost when I am dealing with interest paid on investment in all kinds of pictures, and I am dealing with compensation of \$922,000 paid on the question of profits entirely apart from the production end since the production was only an element of the cost of an item to charge against those profits, and I have \$310,000 interest

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross:

on investment in the studio plant and equipment which studio plant and equipment might have been used, for all I know, equally among the pictures instead of twice as much on a picture costing \$400,000 than on a picture costing \$200,000.

1231

I say I have taken all of those elements into consideration and considered that a proper allocation of this total overhead is to divide it into the number of units produced during the year.

Q. I want to get your reactions as an accountant to this proposition, Mr. Mills. A. That is my position as an accountant.

Q. What you are dividing up is overhead. The base upon which you are dividing it is what we are talking about, and that is based entirely upon production? A. That is right, based entirely on production, the division.

1232

Q. As an accountant, Mr. Mills, did you stop to figure out that if you charge "Letty Lynton" proportionately to the cost incurred during that year for the various productions made, that the share of "Letty Lynton" in the overhead would be considerably less than 1/36th? A. I didn't stop to figure that far.

Q. That did not occur to you at all, did it, Mr. Mills? A. I don't know that it did.

Mr. Pollak: As a matter of fact, he did not have anything to do with the preparation of the exhibit.

1233

Q. Nor did you have anything to do with the 1/36th? That is what I want him to acknowledge. He is trying to defend you fellows that invented the 1/36th.

Mr. Pollak: As a matter of fact I would be glad to have him share in the glory of it. As a matter of fact it was done out in Culver City.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

1234

Mr. Driscoll: That is what I say.

The Witness: I think I did say so in the beginning.

Q. It is true, isn't it, Mr. Mills, that you never made the 1/36th formula? A. It might be difficult to say who made the 1/36th formula; maybe Soule invented it when he invented accounting in the first place. I do not claim authorship of the 1/36th formula.

1235

Q. Let me ask you this, as an accountant will you say that the 1/36th formula is a fair formula for the division of overhead in this case when "Letty Lynton's" proportion of the cost expended in that year is 1.8 per cent? A. I would still say it was a fair allocation of cost.

(Hearing adjourned to Thursday, May 13, 1937, 10 a. m., to be continued on Monday, May 17, 1937.)

HEARING OF MAY 17, 1937.

JESSE T. MILLS, resumed.

Cross examination by Mr. Driscoll (continued):

1236

Q. When these contracts are made do you generally get a deposit on contracts?

Mr. Pollak: What contracts do you mean?

Mr. Driscoll: Exhibition contracts.

A. Answering your question, Mr. Driscoll, there is very little deposit received in advance. At the end of the year 1932 on the domestic exhibitors on all pictures there was only \$27,800.91 in that class. And on foreign companies, I believe in the foreign companies, not Culver, there was a total of \$7,720.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

Q. Do you know what part of the contracts for "Letty Lynton" were percentage contracts and what part was flat rentals?

1237

Mr. Pollak: That is really a matter for the contract department, Mr. Cohen says:

A. That is contract department information which the general books would not indicate.

Q. Do you know, on the percentage contracts—exhibition contracts we are talking about—whether or not it is customary to receive a cash deposit on the making of the contract? A. It is not customary of late years.

Q. Was it in 1932 and 1931? A. Not in 1932, as is proven by the fact of the small amount on deposit at the end of the year.

1238

Q. On this particular picture "Letty Lynton," out of a total of 7,666 exhibition contracts, 7,315 of those, or practically all but 350, were made prior to release, isn't that true? A. I think that is what was testified by the contract department. I haven't those figures before me, nor the data making them up.

Mr. Pollak: That is an exhibit.

Mr. Driscoll: Exhibit 15.

Q. Have you Exhibit 18 before you, Mr. Mills? A. I have Exhibit 18 (producing paper).

1239

Q. Turning to sheet 18-A, the total film rental income there does not include Canada, does it? A. That is true.

Q. Will you turn to Exhibit 20, please? A. I have Exhibit 20 (producing paper).

Q. Turning to sheet 20-A, does your total film rental income there include Canada? A. It does not.

Q. So that you have not got the film rental of Canada on either of those statements, that is, 18-A or 20-A? A. That is correct.

Jesse T. Mills—for Defendants—Recalled—Re-re-cross.

1240 Q. And that would vary your total distributing expense percentage, would it not, if you had it on either one or the other; it would lower that percentage by so much? A. It has no effect on the distributing expense because we spent nothing for Canadian expense, being an outside distributor.

Q. Let us see whether it is or not. In 18-A you presume to give the total expense for maintaining the office of the Corporation for the year 1931-1932? A. Home office expense.

Q. Into that office goes the money that comes in from Canada? A. Yes; it is handled.

1241 Q. And in Exhibit 20-A you have taken a portion of that home office expense and assigned it to Culver? A. That is right.

Q. And you have allowed nothing for the Canadian receipts on either statement? A. That is correct.

Q. You say it would not make any difference in the percentage? A. Because the real expense is in the field and handling distribution, which is borne entirely by Regal. The handling of the mails and other small matter, of course—

Q. You are asking both as to Culver and as to Pictures Corporation the percentage of expense as against the total film rental, isn't that correct? A. That is right.

1242 Q. And you have not allowed for the Canadian receipts? A. Because we allowed for Canada separately; we collected the Canadian separately on "Letty Lynton."

Q. Where are the Canadian receipts allowed for separately; show us? A. I say we accounted for the Canadian receipts for "Letty Lynton" distinct from the others.

Q. So we have in these various accounts the direct charges to "Letty Lynton"? A. That is right.

Q. You are dealing here in these two schedules with something else; you are dealing with the undistributed expense of the home office? A. That is right.

Q. You have not included the Canadian receipts? A. That is right.

Jesse T. Mills for Defendants—Recalled—Re-re-re-cross

Q. Now, looking again at 18-A, this film rental income of \$30,020,526.08, did that include the income from the shorts? A. It did. 1243

Q. How much income is represented in that \$30,000,000 by the shorts? A. \$772,284.74.

Q. Does that figure of \$30,000,000 include the receipts on Cosmopolitan Pictures? A. The \$30,000,000 includes the receipts on Cosmopolitan Pictures.

Q. How much is represented by Cosmopolitan? A. It will take a little time to segregate that figure.

Q. As a matter of fact, the receipts of each picture are set up separately on your books, are they not? A. Yes, there is a separate sheet for each picture. 1244

Q. So that it is not a difficult job to show just how that \$30,000,000 is made up? A. It is not difficult; it would take some little time because the ledgers are voluminous.

Q. Is the Cosmopolitan figure larger than the shorts figure?

Mr. Pollak: If you know, off hand.

A. I would rather not estimate an amount on that without referring to the old ledgers.

Q. Can you tell me whether or not the figure includes the gross amount of the Cosmopolitan, or the share of the Pictures Corporation? A. It includes the gross amount. 1245

Q. In distributing Cosmopolitan the distribution was on a fixed percentage charge, percentage of the gross? A. It was on a fixed percentage basis.

Q. Will you kindly get for me, please, when you can, the part of that \$30,000,000 represented by Cosmopolitan receipts? A. Right.

Q. I presume it is represented by about four pictures or six Cosmopolitan pictures? A. It is more.

Q. Will you kindly break it down into pictures? On this 18-A you have taken depreciation on equipment of the

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross,

1246 home office of \$14,927.54. That is based, is it not, on a depreciated cost figure? A. That is based on an original cost figure.

Q. Original cost figure? A. \$149,000.

Q. Depreciated over what period of time? A. Ten years.

Q. Let me get that again. It is based on original cost figure of \$149,000? A. Odd.

Q. And you took 10 per cent against that for depreciation? A. That is true.

Q. And this \$149,000 had no relationship, no direct relationship with the value of the equipment at the beginning of this fiscal year? A. On the depreciated basis it represented the value.

1247 Q. That is your argument, isn't it, Mr. Mills? A. Yes.

Q. As a matter of fact you did not estimate the value of that equipment at the beginning of that fiscal year to fix the depreciation? A. I did not.

Q. You simply took cost and depreciated against the original cost as a basic figure? A. Yes.

Q. Didn't Mr. Rubin have an expense account of \$1,000 a week besides the figures you have set forth, these two figures of \$50,550 each? A. The total basic compensation including allowance for expenses was \$2,000 per week. That was divided into two checks of \$1,000 each, and there was seven weeks of the year during which 35 per cent cut applied to his salary when those checks were \$650 a week each, which is the reason for the total being \$50,550 instead of \$53,000.

1248 Q. Exhibit 9, if you will turn to that, please, that is the depreciation schedule. There you have two items of depreciation on studio equipment and studio sound equipment totaling \$345,589.18. I don't believe we definitely ascertained as yet whether or not the basic figure upon which that 15 per cent is charged included the cost of props or properties. A. I sent for that information from the Coast. It only came in this morning by wire and I have not had an opportunity to see what figures are included.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

in it. If I can answer that at a later time, it will not be necessary to take the time now to prepare them. 1249

Q. In estimating this interest on investment of \$310,584.16 that we talked about a moment ago, that appears on Exhibit 18-D-5, does that include interest on investment in props? A. It will include any moneys invested in props which we capitalized, yes.

Q. Let us see what we can find out that might give us some information in response to the question. Were moneys invested in props capitalized? A. So far I have found one item of \$12,000 in the year 1932 for props capitalized. I have not been able to trace any other amounts.

Q. But this \$310,584.16 is based upon the investment that had taken place prior to 1932, is it not? A. That is correct. 1250

Q. Do you know how much of the capital, of the principal figure on which that is the interest item, is represented by moneys invested in props? A. No; that is the figure I have asked for a little time to digest, the figures that I have received from the Coast this morning.

Q. So that we have two items then, one is depreciation and two is investment. We want to know if they include moneys invested in props. A. That is right.

Q. Now, Exhibit 19, that is the accounting of the Distributing Corporation, will you tell me whether or not that figure of film rental income of \$727,000 includes the rental from shorts and Cosmopolitan? A. The \$727,000, the first item on Exhibit 19? 1251

Q. Yes. A. That is the income from "Letty Lynton" only.

Q. That is my mistake. This figure of \$30,020,526.08, on 19-A, that is the same figure that we have had before? A. On Exhibit 18.

Q. All of these schedules that had to do with depreciation and had to do with interest on investment are based upon cost and investment figures and not upon the value of the properties at the beginning of that fiscal year? A. I am sure, with one exception.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-cross.

Q. What exception is that? A. That is the value of the land.

Q. That is appraised? A. That is the appraised figure.

Q. Your schedule includes the figure that was given by your appraiser at Culver City? A. Yes.

Q. Except for that my statement is true, is it not? - A. Yes.

Mr. Pollak: I think, for your convenience, Mr. Master, we should get the exhibit number on which this land valuation appears.

Mr. Driscoll: You will find it, if you are interested, on 18-F, the first figure on that page.

Mr. Pollak: Land, \$969,210.

Q. This general situation applies not only to these investment and depreciation figures based upon the home office equipment and studio equipment and so forth, but also to these schedules you have attached to Exhibit 19 having to do with equipment of foreign offices? A. That is true.

Mr. Pollak: That is, that the testimony was based upon actual cost.

Mr. Driscoll: Actual cost; the schedules are made up on that basis.

Q. Now, referring to Exhibit 20-A, this film rental income of \$15,563,592.34, you have already testified, did not include the Canadian rental, did you not? A. That is correct.

Q. How about shorts and Cosmopolitan? A. It includes all other income received by Culver or its distributing subsidiaries, except Canadian.

Mr. Pollak: Culver did not receive Canadian.

A. (Continued.) It includes all income from foreign sources, excluding Canada, as already stated, from all classes of pictures.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

Mr. Pollak: If I may just amplify that—and therefore includes all income received by Culver or its subsidiaries?

1255

The Witness: It does.

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, there will be some more matters looked up and there may be some interrogation on one side or the other about that. You have testified to depreciation on a straight line basis, both as to lands and equipment out at Culver City and as to office equipment here in New York. Will you explain what the theory of straight line depreciation is?

1256

Mr. Driscoll: I don't believe there is any depreciation as to land in here. I don't think that is correct.

Mr. Pollak: You are right.

Q. Both as to buildings and equipment at Culver City and as to equipment at the New York office?

Mr. Driscoll: What is the rest of the question?

Q. Will you explain the theory of straight line depreciation? A. We take the total cost of the asset, whether it is buildings or equipment, and charge ten per cent a year on the office equipment and branch equipment, which is mainly office, 15 per cent on the studio equipment, and five per cent on the studio buildings. As items of cost are added subsequent to the original installation, the ten per cent depreciation is started in the next year after the addition of the improvements or new equipment or new buildings or improvements on the buildings. That 10 per cent is carried on until the cost of the asset is exhausted, in other words, in ten years. So that the total amount on which the depreciation is calculated is always the cost of the asset.

1257

After the depreciation of all equipment entered into an

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

1258

account, the cost of which has been entered into the account, has passed ten years, there is naturally a certain cost there which has been fully depreciated and on which no further depreciation is taken, which accounts for the one million five hundred some odd thousand dollars of which there seemed to be a little confusion—or between two statements—which show no confusion, but rather the actual condition of the account, since this reserve for depreciation was not reduced by the cost of the asset entirely written off, as is done in some cases.

1259

Q. I think we understand that \$1,500,000 item. What exhibits were used for comparison, the two exhibits? A. I think one was 18-F, and 9.

Q. The essence of the matter is—and sticking now for the moment to this \$1,500,000 odd item—is that the same item appeared as original cost of equipment acquired more than ten years before and, therefore, completely depreciated, and also appeared as the write-off on that equipment; is that right? A. That is right.

Q. And it washed itself out? A. It did.

Q. What I wanted to get more particularly was this general theory of so-called straight-line depreciation. Is this correct, Mr. Mills, that unless you depreciate on a straight line basis you would never completely depreciate any item?

1260

Mr. Driscoll: You asked him that before and it is in the record.

Mr. Pollak: I would like to get an explanation of what that is.

A. I will explain it in this manner: If we buy equipment for \$100,000 and write it off on the straight line basis, we would write off \$10,000 a year for ten years. At the end of the ten years we would have no cost left to depreciate and our asset would be entirely depreciated.

If we were to take a percentage of the undepreciated cost at the beginning of each year, you would have to take a

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

very much larger percentage than the ten per cent to get a fair distribution of depreciation charge in any one year. You would have to go as high as 20 per cent to arrive at a fair charge for depreciation on the equipment, and assume that you are keeping up this equipment by constant expenditures, as is our case, at the end of any one year you will have some equipment which is, say, nine years old and some which is eight years old and some which is five years old and some which is only a year old, and the composite result of these various aged equipment written off, for instance, 20 per cent of the value at the beginning of the year, would still give you a fair basis for arriving at your depreciation for that year. But you can hardly jump from one system to the other in the middle of your term of depreciation.

1261

1262

Q. Without regard to that, isn't this true, that if I take an office safe, which I suppose is as durable as anything, and depreciate it not on some fraction of the original cost each year, but on some fraction each year of the residual value at the end of the last year, I would never get it completely depreciated? A. You never would.

Q. Because I would always be getting a fraction? A. You would only be taking a part.

Q. That applies to whatever object you depreciate? A. Yes.

Q. Mr. Mills, do you want to add anything to the testimony that you have given with regard to your not including distribution expense for Canada in your estimates of ratio of overhead to receipts, either the Culver estimate or the Pictures and Distributing estimates? I know you have given some testimony. A. Yes. I would like to say, on the Culver, of course, that there Canada is entirely eliminated.

1263

Q. There is no relation whatever? A. No relation to it whatever. On Pictures, I have considered that to arrive at a fair basis of total expense allocated to "Letty Lynton" as one of the pictures, as distinguished from all pictures, that

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

1264

Canadian income from all pictures should be excluded because none of the expenditures included in the general overhead had anything to do with, or rather, was affected in any way, by the Canadian distribution. They were entirely expenses applicable to the domestic distribution, and the fact that the Canadian distribution was handled by an entirely independent concern on a percentage basis stopped me from including any of those expenses as applicable to Canada and, therefore, as applicable to their gross receipts.

1265

Q. Putting it succinctly, is this a fair statement—that you made no allowance for distribution expense in relation to the Canadian business because there was no distribution expense in relation to the Canadian business? A. That is correct.

By Mr. Driscoll:

Q. I suppose the same thing applies to the foreign subsidiaries? A. No, the foreign subsidiaries are subsidiary corporations of Culver, require a certain amount of supervision on our part, on the part of the office, and traveling expenses and other items enter in there. They are not outsiders, except one of the small companies, Sweden.

By Mr. Pollak:

1266

Q. Which are only partial? A. Yes.

By Mr. Driscoll:

Q. They are part of the family, these foreign subsidiaries; they are subsidiaries of Culver; they are not outsiders? A. They are not outsiders.

Q. But in the case of Canada there is not any necessity of including that cost as part of the general expense? A. That is true.

Mr. Driscoll: That is all.

WILLIAM L. KEATING, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows. 1267

Direct examination by Mr. Pollak:

Q. What is your occupation? A. Certified public accountant.

Q. Are you a member of any accounting firm? A. A member of the firm of Miller, Donaldson & Co.

Q. They were accountants for M-G-M in 1932, is that correct? A. That is correct.

Mr. Driscoll: I hope they are still.

1268

Q. And Mr. Driscoll is correct in his hope that you still are the accountants for M-G-M? A. We still are.

Q. Mr. Keating, I will show you a certain item of \$500,000, Reserve for Continuities—

The Special Master: Exhibit 18-D-5?

Q. On Exhibit 18-D-5 there appears an item of \$500,000, Addition to Reserve for Continuities. Exhibit 18-D-5 is an accounting here (handing paper to the witness). A. I recognize it.

Q. You can just answer this question yes or no. Did you ever have anything to do with the setting up of that item in 1932? A. Yes, I did. 1269

Q. Will you tell in your own way how that item came to be set up in 1932?

Mr. Driscoll: I don't think I am so much interested in that as what it represents. I object to the form of the question.

Mr. Pollak: The answer will give what it purports to represent.

Mr. Driscoll: How it came to be set up—it might

William L. Keating—~~for~~ Defendants—Direct.

1270

have been raining that day and they had nothing else to do.

Mr. Pollak: If that is true then it won't mean anything.

A. Would you like a schedule on that, or my own words?

1271

Q. I want your own words. A. It was evident to us from experience in previous years, and particularly in this year, that not every continuity which was purchased would find its way into production and eventually appear in a picture. It is extremely difficult to measure the value of a writer simply because his thought has been expressed upon paper, and to make provision for those continuities which were doubtful of ever reaching the finished picture stage we analyzed all the pertinent data and in conference with our colleagues, Price, Waterhouse & Co., arrived at a figure of \$500,000 as representing a reasonable reserve against the total balance of continuities which would not eventually be used.

Q. That is, did you find from your analysis of the business and of its past history that as a regular practice there were more continuities written than were put into production? A. Yes.

1272

Q. I now show you a schedule. Did you prepare this schedule, Mr. Keating (handing paper to the witness)? A. Yes.

Q. And it was correctly prepared, of course? A. I believe so.

Q. Did you have anything to do with the setting up of a reserve for continuities in 1930? A. I had much to do with the direct write-off of continuities in 1930. There was no reserve set up.

Q. In 1930 you just completely wrote off the accumulation? A. Yes, those which we believed to be unuseful.

Q. Will you explain in a general way or as thoroughly as you can, how you came to select the figure of \$500,000 for the reserve in 1932? A. Well, the first arrival of that

William L. Keating—for Defendants—Direct.

figure naturally consisted of two steps. First we considered all of the figures available to reach a decision that a reserve was required, and secondly, it was a matter of exercising judgment as to how much of a reserve appeared at that time to be required to provide for these continuities of doubtful value. It would be pretty hard to tell how much you were going to lose from doubtful ones; it will be impossible to tell exactly until several years have passed which of them will prove not to be used.

1273

Q. But among a great many doubtful ones you assume that a number will not be used? A. That is true.

Mr. Pollak: I offer this schedule in evidence.

1274

(The paper just offered was received in evidence and marked Defendants' Exhibit 22, of this date.)

The Witness: You mean, explain the method by which we arrived at the necessity for a reserve and the path of actual thought we followed in arriving at the \$500,000?

Q. That is exactly what I want. Explain it in your own way. A. We started off in 1930 with a balance of continuities costing \$881,000 odd. The exact figures are on that schedule. During 1930 we spent two million two and used one million seven, which left an excess charge that year of a little less than \$500,000, and at the end of the year we wrote off \$505,000, so that the net decrease for the year was \$20,000, and we ended the year with a balance of \$861,000.

1275

Starting with that balance at the beginning of 1931, we expended a little less than two million three and used or sold a little less than two million one, so that we had an excess of expenditure of a little above \$200,000 for that year. However, some of those that we had specifically written off in 1930 were reinstated because they found they

William L. Keating—for Defendants—Direct.

1276 could use them, and also a small amount was written off directly that year; but the net change was \$22,000 of reinstatements.

Q. In 1931? A. In 1931. So that we had a net increase in the balance of \$236,000, ending the year with a balance of \$1,097,000. A further thought in 1931 was that the studio continued to operate at a very high rate. I believe 1930 was the peak up to that time, and 1931 was substantially the same total expenditures.

Further, productions used in 1930 were only sixteen million dollars, whereas in 1931 they were twenty-one million dollars.

1277 All of these indicated to us at the end of 1931 that there was every chance that this excess continuity charge would find its way into productions, completed productions, and that there existed no necessity this year for write-offs of continuities or setting up a reserve. In other words, we had cleaned house pretty thoroughly in 1930 and there was every expectation that production would continue at a high rate.

1278 However, in 1932 the picture changed considerably with respect to the production and consumption of continuities. We expended for continuities during the year two million one and used or sold only one million five, leaving an excess of \$581,000. There was written off specifically \$51,000, leaving a net increase of \$530,000. Also, studio expenditures had fallen, had decreased \$4,000,000 from the previous year, and productions consumed only sixteen million dollars as against twenty-one million the previous year.

All of these facts, together with an analysis of the age of the continuities remaining on hand indicated that we should either write off specifically or set up a reserve if unable to specify exactly which continuities should be designated as worthless, a sum of roughly \$500,000. There was some talk at the time of making it a larger sum, but my colleague, Mr. Brewster of Price, Waterhouse, decided that if

William L. Keating—for Defendants—Direct.

we had to decide upon a specific amount that \$500,000 clearly was absolutely necessary to correctly state the real value of the continuities on hand at that time.

1279

Q. In substance, did you find that in that year 1932 there was a great diminution in the consumption of continuities at the studio and a relatively large production of them?
A. Yes.

Q. Mr. Keating, you have been connected, have you not, with M-G-M accounting continuously since the year 1930?

A. As a public accountant I have visited the studio and audited them every year except one, in which year my senior partner, Mr. Miller, visited the studio and performed the same supervisory work that I would have done had I been there.

1280

Q. Mr. Keating, have you prepared a second schedule showing the figures as to continuities written and charges incurred therefor and the continuities used or sold or rejected after once having been reinstated, for the whole period 1930 to 1936? A. Yes.

Q. Is this that statement (handing paper to the witness)? A. Yes, it is.

Q. And of course this was correctly prepared? A. Yes.

Mr. Pollak: I offer it in evidence. I think it completely explains itself.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. 23, of this date.)

1281

Q. Mr. Keating, I have asked you to do another piece of work for us, also including the whole period from 1930 to 1936. Have you prepared for that period a statement of relative cost, I think we may call it, of on hand material, inclusive of stories and continuities and all other costs of production at the M-G-M studio, with a breakdown of cer-

William L. Keating—for Defendants—Direct.

1282 tain of the regular material costs? A. Yes, I have. (Paper produced.)

Q. And that was correctly prepared? A. I believe so.

Mr. Pollak: I offer it in evidence.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues in any way.

1283 Q. You personally prepared this document which I have handed to the Special Master, this comparative statement of direct production costs? A. I have supervised the preparation of it, but an assistant took the data from the material which has appeared in our reports for this whole period.

Q. And it is correct? A. I believe it to be correct.

The Special Master: It will be received, and the exception noted.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. 24, of this date.)

1284 Q. On Exhibit 24, what does the item "Book" on the last column indicate, except for the percentage item? A. That represents the purchase of books.

Q. The item "Original Stories, Continuities, Dialogue and Script Expense" means the expense in connection with writing at the studio? A. Yes.

Q. Including re-writing for picture purposes of material which in book form had been acquired? A. That is right.

Mr. Pollak: I think that is all; you may cross-examine.

William E. Keating for Defendants—Cross.

Cross examination by Mr. Driscoll:

1285

Q. Let us go back to Exhibit 22. You start with 1930 there, the balance at the beginning of the year, \$881,793.27. Where did you get that figure? A. That is the accumulated cost of continuities which were on hand at the beginning of the fiscal year ended in August, 1930; or, in other words, it would be the balance on hand at the end of August, 1929.

Q. Was that after deducting any write-offs or setting up any reserves? A. There was no reserve set up, Mr. Driscoll; that was the only sum that was on the balance sheet in 1930.

Q. Actual cost? A. Actual cost of continuities on hand at the end of the fiscal year 1929, which is equivalent to the beginning of the fiscal year 1930.

1286

Q. When you speak about continuities do you distinguish between the term continuity and other literary material? A. No; continuity is a general term out there. I think the expenditures are broken down into Books, Original Stories, Continuities, Dialogue and Script Expense. This term Continuity is a general term embracing all original stories, continuities, dialogue and script expense.

By Mr. Pollak:

Q. You mean, as used in Exhibit 22? A. There are no book costs in this expense, Mr. Pollak. Books are carried in New York until such time as they are transferred to the studio to be used in production.

1287

By Mr. Driscoll:

Q. When you speak of books you mean a published story? A. Book rights.

Q. If it was a play it would come in under the term Con-

William L. Keating for Defendants—Cross.

1288 Q. Continuity? A. No, it would come in under the term Books. If we bought a play it would be a book.

Q. Then you exclude in arriving at this term Continuity books, plays and things of that sort that you buy?

Mr. Pollak: On Exhibit 22.

Q. We are talking entirely about Exhibit 22. A. That is true.

1289 Q. Then what does it include? You are excluding books and you are excluding plays, and you are excluding short stories that may be bought from magazines and things of that type. A. This would include original stories produced at the studio, the salaries and expenses of writers developing purchased books and plays and short stories, the writing of dialogue, the script expense in the preparation of them, all to bring an idea or somebody else's ideas expressed in a purchased book or play through to completion.

Q. Expressing it differently, it practically represents labor expended by the corporation in the preparation of literary material? A. Plus any overhead of that department, which is relatively small.

Q. But does not include purchases of literary material? A. That is right.

1290 Q. How long had that item of \$881,000 been on your books, or any part of it? A. That is very easy to explain; it represents all our reports for 1929, 1928 and 1927, back.

Q. Generally speaking, part of it may have been on there for a great many years, isn't that true? A. Some portion of the \$881,000 may have been there for a year or two or more, which I can furnish you if you wish to have it.

Q. When you are preparing a story for production in pictures in the ordinary course of business that story is produced in the matter of months, isn't that correct? A. I would rather show the facts than to make my observations, Mr. Driscoll.

William L. Keating for Defendants—Cross:

Q. Have you those facts to show me? A. If you wish a general observation, some stories take a few months; some of them, if they are big stories, may practically take a year or even more to bring through to this completed stage, and others might sort of die on the vine while they are waiting their development; but the average story, I should say, could be developed in three or four months. 1291

Q. When such a story goes through to production, you charge out of this item here the money, labor and material expense put into that particular story, and charge it to that particular production? A. Yes, when it is ready for shooting it is charged to production and is carried along there until completion.

Q. Take Grand Hotel for an illustration, and you were working on that for a year; you would transfer out of this account here and charge directly to Grand Hotel all of these charges as soon as Grand Hotel got into shape for shooting? 1292

A. That is correct. The practice is to collect the charges around the continuity of Grand Hotel until it was ready for shooting, and then to continue the charge in what we call Work in Process and is one of the final charges against the picture as they begin to shoot.

Q. And when you come to that shooting on a production, you do gather together all these items that you spoke of as having been centered around that production and charge that to that production? A. Yes.

Q. They become a direct charge against this production? A. Yes. 1293

Q. Then this item, \$881,793.27, might properly be called Work, Labor and Material that has been put into continuities which have been temporarily abandoned? A. No.

Q. Well, permanently abandoned? A. No.

Q. How would you describe it, Mr. Keating? A. That represents work in process on continuities uncompleted and may include some that never will be completed and put into production, but they include quite a batch of continuities that are not ready for shooting.

William L. Keating for Defendants—Cross.

294 Q. Do you think "may include some" is strong enough?

A. I agree that it did include some that never did find their way into production.

Q. As a matter of fact, are you familiar with the account of the "Letty Lynton" picture? A. With the account of it?

Q. Yes. A. I am familiar with the costs collected around "Letty Lynton."

Q. You have examined the books on "Letty Lynton", I presume? A. We have examined the books of the company in the studio, and when I think of "Letty Lynton" I think of the cost accounts; and we have examined the production costs on "Letty Lynton."

295 Q. In the case of "Letty Lynton" there was taken out of this account I presume the cost of this continuity for "Letty Lynton, and transferred to "Letty Lynton" as a charge against "Letty Lynton" direct? A. That is right.

Q. And all of the work, labor and material that you could segregate against "Letty Lynton" was charged against "Letty Lynton" direct? A. Yes.

Q. That is a sort of reservoir that has been used as a means of separating them that way? A. May I say this? That if "Letty Lynton" were in preparation in the fiscal year 1930 and had accumulated some costs on the continuity, it would be in there to the extent that the cost had been expended. Now, suppose there was picture XYZ; we kept it a year and then put it through to completion, upon which we had some expenditures for continuity, that also would be there. It represents a long list of continuities upon which money had been spent but were not quite ready for shooting.

296 Q. I think I understand it quite well, Mr. Keating. As a matter of fact, if there were these various payments and expenses centered around the continuity of "Letty Lynton" that had accumulated in the year 1930, and then if in the year 1930 it had not gotten into shooting yet, you would

William L. Keating for Defendants—Cross

carry that into 1934 and it would still be carried in this account? A. Yes. 1297

Q. In 1932, assuming that "Letty Lynton" was shot in February, 1932, all of this would be picked out of that account and put against "Letty Lynton" directly? A. That is right.

Q. And "Letty Lynton" would pay for those things; they would never go back into this account again? A. In the ordinary course, that is true.

Q. Assuming that "Letty Lynton" was completed and was distributed, and so forth, they would not go back into this account? A. If "Letty Lynton" were completed and distributed the continuity cost accumulated around "Letty Lynton" title would flow into the Work in Process and flow out into the total cost for "Letty Lynton" as such. But if you wish me to add a bit there, it would not include any overload for these rejected continuities in the form that I have described. 1298

Q. Is it fair, then, to characterize these as rejected continuities, Mr. Keating? A. Which?

Q. These, this overload which you speak of; these are actually rejected continuities, aren't they, Mr. Keating, using your term? A. Let us make sure that we understand each other, Mr. Driscoll.

The Special Master: I think I understand it. Others of them might not have come out at that particular time. 1299

The Witness: I would have to refer to Exhibit 23, to find out how many are good or bad or make other schedules which would show directly.

Q. Let me ask you this one question. This item of \$500,000 set up in 1932, wasn't that simply a profit and loss charge rather than a production cost charge? A. What makes you say that?

William L. Keating for Defendants—Cross.

1300

Q. I am asking. I am not an accountant; I don't know a thing about it, and am willing to learn. A. If you are seeking the facts, that is a job that I always like to endeavor to explain. If you were a small merchant and had a list of accounts receivable on your books, or an inventory of groceries, and you knew that some of your accounts were going to become bad but you didn't know which ones, and you knew some of your groceries were going to spoil; and you wanted to value your inventory and accounts receivable, you probably, as a prudent man, would set up a reserve for those which were going to become bad. It is a matter of judgment whether you set up a reserve of \$500 for a small merchant or \$500,000 for a large one. This is the best expert opinion of two very good public accounting firms as to the valuation reserve of these continuities still on hand.

1301

Let me say it this way,—that having on hand an inventory of continuities which came out of the brains of the writers employed on this work, which cost us a million six, the question is what are they really worth, and a valuation reserve of \$500,000 was set up, so that this might be expressed at \$1,128,425.04, leaving what we considered to be their value as nearly as it could be ascertained in evaluating the products of the writers' work.

1302

The Special Master: That doesn't exactly answer Mr. Driscoll's question; does it, Mr. Driscoll?

Mr. Driscoll: No, it does not.

The Special Master: Do you wish to press your question?

Mr. Driscoll: No.

The Witness: I would be glad to answer your question, if I have not done so.

Q. Strictly speaking, it is a profit and loss proposition which has nothing to do with production cost whatever?

William L. Keating for Defendants—Cross.

A. I cannot agree with you, Mr. Driscoll. If we had time 1303
I would be very happy to try to explain it to you.

Mr. Pollak: I think that you might perhaps expand the answer.

The Special Master: What did he do; charge it against earnings or did he charge it against surplus?

Q. Which did you charge it against? A. The rejected continuities, directly written off specifying the titles or written off into the reserve valuation, is charged to general overhead and the unabsorbed overhead at the end of the fiscal period, as I understand it, although this is done at New York and not at the studio, charged to the picture X 1304
and written off exactly as if a picture of that title had been produced.

Q. In other words, you charged it to profit and loss? A. No.


Q. You did not charge it to earnings, did you? A. It could be an overlay or an overcharge, a small amount of which would be apportioned against every picture that had been produced at the studio, therefore finding its way into cost. But instead of that it is charged to what might be called a fictitious picture; in other words, it is charged to the cost of all of these pictures, but concentrated into one picture which I take is a fictitious picture but nevertheless accomplished substantially the same purpose without attaching small sums to pictures already released. 1305

Q. Did you set up on your books an account for this picture X? A. Yes. It is not done at the studio, but is transferred to the New York office.

Q. You don't know what is done at the New York office? A. I do through my New York men and from my partner's supervision of the work in New York. What I wish to try to make clear is that it does make its way into the cost of their production.

MICRO CARD

22

TRADE MARK 

39



1412

65



William L. Keating for Defendants—Cross.

1306 By Mr. Pollak:

Q. Was there a reserve for continuities or write-offs prior to 1930? A. The reason I started this schedule in 1930 was because that was the occasion of my first visit to the studio of which I had personal knowledge, but I can very easily ascertain from our reports made by accountants resident in Los Angeles who did the work for us, for any year prior to 1930. I have no personal knowledge, as I said, of reserves or any write-offs made prior to that year 1930, but I do feel that the reserve method was not followed prior to the period for which this statement is prepared.

1307 By the Special Master:

Q. Is it your testimony that since 1930 there has been actually set up \$500,000 as reserve for continuities? A. The first reserve was set up in 1932 in the amount of \$500,000.

By Mr. Pollak:

Q. There was an actual write-off in 1930? A. There was an actual write-off of \$505,179.87.

1308 The Special Master: And there was in 1932 an annual reserve set up?

Mr. Driscoll: Not annual.

The Special Master: Just the year 1932?

Mr. Driscoll: Yes.

The Witness: May I say there was a reserve in 1932 of \$500,000, and it so happens there have been reserves taken of \$500,000 each year every year since except in 1933 it was \$450,000; continuing in 1934, it was \$500,000; in 1935 it was \$500,000, and in 1936 it was substantially \$1,100,000.

William L. Keating—for Defendants—Re-direct.

By Mr. Driscoll:

1309

Q. So that there is not any set figure on it? A. No.

The Special Master: You are asking for the account in which that appears?

Mr. Driscoll: Yes; I would like to see what they do with this. I am not satisfied. I want to see this account, this picture X. That is all I want to ask at the present moment.

Re-direct examination by Mr. Pollak:

Q. Mr. Keating, in each year the write-off or reserve, 1310
whichever it is, represents the best judgment that you can bring to bear on this problem, of your firm of Miller, Donaldson & Company? A. That is correct. It results from a new survey each year of the conditions at the end of each fiscal year.

Q. It appears that the figure for 1936 was much bigger than for previous years, and also that in that year it was an actual write-off and not the creation of a reserve? A. Let me put it to you this way, Mr. Pollak. At the beginning of the fiscal year 1936 we had accumulated a reserve in the fashion I have described of \$1,950,000. At the end of the year we found that there had been accumulated large charges for continuities which were not being used, in much the same state of conditions as we had in 1932, so that instead of taking a reserve for \$500,000 we realized that we had to have a larger reserve. Understand, all these years we were trying to get what we call specific write-offs, but it was difficult to have them say which continuities they were willing to abandon. In 1936, at the end of the fiscal year, they were willing to specify which particular stories would not in all probabilities reach the finished stage, and the accumulation of that amounted, as I say, to \$1,100,000. If they had not specified, with our collaboration, the par-

1311

William L. Keating for Defendants—Re-direct.

1312 ticular stories they were willing to abandon, we would have continued the reserve method and set up a million one or a million five hundred thousand dollars.

By Mr. Driscoll:

Q. In other words, they arrived at a decision that certain stories A, B or C, were worthless? A. Yes.

Q. And just wrote them off? A. That is right. It is a difficult thing to do and it takes a lot of pressure to get people to say that something brought along to a certain point will never be completed. They find it difficult to say that.

1313 Q. You don't know how much was done before 1932 and how much was done after 1932? A. I know for each title just when the work was done.

Q. You have those records? A. We have those records and my reports and papers.

Mr. Pollak: Anything more?

Mr. Driscoll: No.

1314

HEARING OF MAY 24, 1937.

1315

At the office of the Special Master, No. 50 Broadway, New York, N. Y., May 24, 1937, at 10 o'clock A. M.

Pursuant to mesne adjournments.

Present—THE SPECIAL MASTER.

~~APPEARANCES:~~

As before.

JESSE T. MILLS, resumed the stand:

1316

Cross examination by Mr. Driscoll (continued):

Q. For the purpose of the record, Mr. Mills, will you tell me whether or not you have ascertained whether or not the items of equipment that appear on the various schedules which we talked about at the last hearing include the cost of props? A. It does.

Q. Have you the Schedule 20 before you, Mr. Mills?

A. That is Exhibit 20?

Q. Yes. A. Yes.

Re-direct examination by Mr. Pollak:

1317

Q. Mr. Mills, have you information at hand on the question Mr. Driscoll has been interested in, whether your depreciation of equipment, Exhibit 9, in which you depreciated equipment, include in the figures a certain amount of props? Is that correct? A. That is correct.

Q. Can you state whether those props were props that were specific to any production, or were they a part of the permanent appurtenances and devices of the studio? Which were they? A. They were not specific to any particular

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1318 production, but were props used for all productions and purchased for all productions at the time of their purchase. They were definitely allocated to that group.

Q. To general production? A. To general production.

Q. That is true of that whole item? A. Of all items that enter into the props and equipment account.

Q. Exhibit 9? A. Yes.

Q. There was testimony, I believe, at Culver City, about the practice of salvaging props that were specific to a particular production; is that right? A. I don't know about that testimony.

1319 Q. At all events, whether you know about the testimony or not, do you know that these props did not enter into the accounts of any particular production? A. That is true.

Q. That is, they were turned over to the production when needed, and then turned back from the production to the general equipment of the studio, is that right? A. That is right, without charge to the particular production.

Q. Without charge to the particular production; without either profit or loss on account of the particular production? A. Yes.

Q. Can you state in general terms what those particular props are? A. No. I would have to get that information.

Q. Who would know that? A. From the Coast.

1320 Q. But you are informed by the Coast that these props were of that type? A. Very definitely.

Mr. Pollak: Teletype message from Mr. Craig at Culver City studios to Mr. Mills: "Props included in equipment schedules by fiscal years as follows: 1927 \$138,600.38; 1928 \$35,427.68; 1929 \$34,628.52; 1930 \$58,383.69; 1931 \$51,882.22; 1932 \$12,948.04. These figures include only those props which were purchased to increase our property stock and do not include those props which were purchased speci-

Jesse T. Mills for Defendants—Recalled—Re-cross.

fically for a definite picture. Props that are purchased for specific pictures are charged directly to the negative cost. No credit is given to the picture when such props are returned to our property store-room. The basic reason for this is that the properties purchased for a specific picture are usually such as are not common to the general run of pictures so that the prop would not be stocked except for its definite requirement in the picture to which it is charged. I trust that this explains information which you requested."

1321

Q. Now, Mr. Mills, going to another matter, did you have certain computations made of overhead of the studio based on gross receipts from the pictures produced at the studio in the year 1932; just answer yes or no? A. Yes.

1322

Q. In making that computation you excluded, did you not, such so-called outside producers, what does that mean? A. Pictures produced by others than Metro-Goldwyn-Mayer, not at the Metro-Goldwyn-Mayer studio.

Q. That is, you distributed those pictures, but you did not produce them, is that right? A. That is true.

Q. The calculation made under your direction was a correct calculation, was it? A. It was.

Mr. Pollak: I offer it in evidence, Mr. Master.

1323

(The paper just offered in evidence was received in evidence and marked Defendants' Exhibit 25, of this date.)

Cross examination by Mr. Driscoll:

Q. What are these outside producers that you speak of? Can you tell us more about them? A. They are principally productions of Hal Roach, comedies.

Q. How many productions did Hal Roach have that

Jesse T. Miller for Defendants—Recalled—Re-cross.

1324 year? A. There were approximately 36 to 40 Hal Roach productions.

Q. Will you make up a schedule showing the breakdown of this, outside producers receipts? A. Yes.

Q. You have taken the United States receipts for 1932 and the foreign for 1933? A. Yes.

Q. As a matter of fact, the foreign for 1933 was considerably less than for 1932? A. I don't recall those comparative figures. (Examining papers.) Gross receipts from the foreign for 1933 were 700 odd thousand dollars less in 1933 than in 1932.

1325 By Mr. Pollak:

Q. Out of a total of how much? A. The figures for 1932 were \$16,339,787.44, and for 1933 were \$15,563,592.34.

By Mr. Driscoll:

Q. Let me understand this schedule a little more thoroughly. You have here in your first column, under the heading "All Pictures" gross receipts in the United States in 1932, \$30,020,526.08? A. Right.

Q. Now, what does that represent? A. That is the same figure that you will find on Schedule 18-A at the top of the page, as the total net rental income excluding Canada of the Metro-Goldwyn Pictures Corporation, for the year ending 8-31-32.

Q. Let us come back to this item of \$30,000,000. What you are showing here is the gross rental that all the pictures brought in during that fiscal year? A. That is true.

Q. And a picture like Grand Hotel, that was not finished until the end of the fiscal year and not released until the following fiscal year, is not represented at all in that item? A. There are receipts from Grand Hotel represented in that item. It was finished before the end of the fiscal year.

1326

Jesse T. Mills—for Defendants—Recalled—Recross.

Q. It was not released until after the end of the fiscal year? A. The general release date. But the receipts from the road shows were included in the \$30,000,000. 1327

Q. But all of the receipts from Grand Hotel were not in there? A. Only the receipts up to August 31, 1932.

Q. But all of the cost of making Grand Hotel was included in that fiscal year? A. That is true—or in the previous year.

Q. It is true, isn't it, that strictly speaking these figures here do not represent exactly the same product that was made during that fiscal year? A. That is true.

Q. And some of this product represented in this thirty million dollars of receipts was made during the previous fiscal year and some of them that fiscal year, isn't that right? A. That is true. 1328

Q. Some of it might have been made two or three years prior to that fiscal year? A. Some small receipts still received from the older pictures.

Q. May I ask you this, Mr. Mills? In the manufacturing plant, in the ordinary commercial plant for the manufacturing of shoes, for instance, or automobiles or something else, there is, we might say, a direct relationship, is there not, between the cost of production and the sales?

A. In the manufacturing of shoes I should think the direct relationship would be closer.

Q. In the theatrical or motion picture business it is a fact, is it not, that the amount of money put into a production is not a guide as to the amount of money that you are going to get out of the production? A. That is true. 1329

Q. It is a fact also, is it not, Mr. Mills, that pictures that have cost a small amount of money have oftentimes brought in a large amount of money? A. That is true.

Q. It is true, in the motion picture business, that pictures that have cost a large amount of money have oftentimes brought in a small amount of money? A. In comparison.

Q. So that there is no definite charging up of a per-

Jesse T. Mills—for Defendants—Recalled—Re-cross.

centage of profit between production cost and sales, is there? A. I don't get your conclusion.

Q. What I mean by that is this: You do not arrive at your sales price by adding onto your production cost a certain percentage of profit, as you might in the manufacture of shoes or automobiles? A. That is true.

Q. Your production, in other words, has very little relationship to the sales of the picture? A. I wouldn't say it has very little relationship.

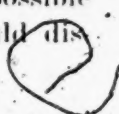
Q. What is the relationship? A. As you say, a production which may cost half as much, one production may cost half as much as another production, and yet they will both gross the same amount of sales, and while to some extent the more expensive productions would be expected to gross correspondingly larger sales, it is true that the more moderate the cost of a production the greater the chance of profit on the investment is. And that is the reason that we have gone into the gross receipts basis as distinguished from the direct cost basis, because the gross receipts of the various pictures are more a measure of their real worth than the actual cost of production.

Q. Exactly. They are more a measure of the real worth of a picture than the actual cost of production. Now, as matter of fact, you do not put on your books a distribution of the overhead in proportion to the receipts, do you. Answer yes or no, please. You do or you do not. When I say "overhead" I mean studio overhead. A. We do not place that on our books.

Q. It is not good accounting, in your opinion, is it, Mr. Mills, to distribute studio overhead in proportion to the receipts of pictures? A. If it can be ascertained, it is the best of accounting, in my opinion.

Q. It is the best of accounting, in your opinion, that a picture that has cost \$100,000 and brings in a million dollars should bear as much overhead as a picture that cost half a million dollars and also brings in a million dollars? A. Yes, for the overhead item.

Jesse T. Mills—for Defendants—Recalled—Re-re-cross.

Mr. Pollak: When I put in that exhibit (No. 25) 1333
I said it was not in substitution of our theory of
1/36th. It is in confirmation of it. It was also for
the purpose of laying before the Court other possible
bases of computation, in case the Court should dis-
agree. 

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, if you happen to know, speaking generally,
is it true that a more expensive picture will gross more than
a less expensive picture, by and large? A. It is true.

Cross examination by Mr. Driscoll (continued):

1334

Q. Mr. Mills, you have already testified here that the
business consists of making of pictures and the distribution
of pictures? A. Right.

Q. Those are the two functions of the business, aren't
they; your distribution corresponds to the selling of an
ordinary product? A. Yes.

Q. Manufacturing on the one hand and selling on the
other, your production of pictures and the distribution of
pictures, that is correct, isn't it? A. That is correct.

Q. And the production of your pictures takes place in
Calver City? A. Actual production.

Q. You have a cost department there, an accounting
department? A. Yes.

1335

Q. They keep complete records, do they not? A. They do.

Q. Vouchers and receipts and checks and all that sort of
thing? A. They do.

Q. And any expense incurred at the studio is kept out
there in detail, is it not? A. Some expenses are paid from
the home office.

Q. Are they kept accurately? Can you definitely ascer-
tain what they are? A. Yes.

Q. What expenses in the production of pictures are there,

Jesse T. Mills—for Defendants—Recalled—Re-re-cross.

336 overhead expenses or other expenses, that you have that you cannot ascertain? A. When you say that I cannot ascertain, do you mean I cannot ascertain as being directly applicable to certain pictures or to the studio in general?

Q. To all of the work at the studio? A. We have work at the home office in addition to the work at the studio.

Q. Do you know what it is? A. Yes.

Q. Are you able to ascertain what it is and set it up on your books? A. I am.

Q. And that is done ordinarily? A. Yes.

337 Q. Isn't it reasonable to say that you can definitely ascertain the cost of operating your studio from the beginning of the fiscal year to the end of the fiscal year, applying to any fiscal year? A. That is true.

Q. And in that expense you separate it between direct charge to pictures and undistributed cost? A. That is true.

Q. And you know what your direct charges are of each and every picture manufactured at the studio, do you not, and so enter them up on the books? A. The charges directly applicable to pictures are segregated.

Q. And the other charges, you know what they are, the undistributed expenses, for a year? A. That is right.

Q. And you carry that right out in dollars and cents for the fiscal year? A. That is right.

338 Q. And that expense, those accounts, are entirely separate and distinct in so far as your accounting department goes, from the cost of distributing the picture, isn't that true? A. The studio expenses are entirely separate.

Q. On the other hand, you take the cost of distributing the pictures in much the same way, and you keep your records complete so that you are able to show the cost of distributing the pictures for any one fiscal year, isn't that true? A. The cost of distribution, yes.

Q. There is no conflict between the cost of production and the cost of distribution? A. There is no conflict.

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

Q. There is little, if any; that is the way your books are set up? A. That is right. 1339

Q. And that is the way you have them? A. Yes.

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, have you general figures that show additions to sound equipment, other than the additions or installations testified to by Mr. Craig? Just yes or no. A. Yes.

Q. Can you give me the figure for the year 1928? A. \$66,000.

Q. And for the year 1929? A. \$408,638.97.

Q. And for the year 1930? A. \$232,623.31. 1340

Q. For the year 1931? A. \$77,029.67.

Q. And these were included, of course, in the items of equipment that you depreciated? A. They were.

By Mr. Driscoll:

Q. It is true, is it not, that most companies divide the negative cost between domestic and foreign on a 60 and 40 basis, Mr. Mills? A. No, I think you will find that each company uses such a percentage as they find from past experience represents their pro rata income from domestic and foreign.

Q. In other words, they try to divide it as nearly equal with the income in the same relationship between the income from domestic and from foreign exhibition as they can? A. They do. 1341

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, when you make contracts for distribution you make them, generally speaking, for a large number of the pictures at once, do you not? A. That is true.

Q. In other words, there is no possible way of segregating

Colloquy of Counsel.

2 the exact cost of distributing an individual picture; that is true? A. That is true.

Mr. Pollak: The form of distribution contract, if your Honor please, is in evidence as Exhibit 16, and shows that.

It is stipulated that either side may offer in evidence any part of the record on the trial had in the District Court between the parties to this accounting proceeding, subject to the objection as to materiality and relevancy and not subject to objection as to competency.

3 It is stipulated, in view of the fact that the gross figure for the making of the Spanish version is already in evidence, that the defendants may withdraw Defendants' Exhibits 7 and 8, which have to do with the detail making up that gross figure. (Defendants' Exhibits 7 and 8 were returned to Mr. Cohen.)

4 Mr. Pollak: The order of reference calls for an accounting by Loew's Incorporated. As has appeared from the testimony already introduced, Loew's Incorporated had no part in either production or distribution and no share in the profits of "Letty Lynton" except as a stockholder in certain corporations some of which are the other defendants, and also as a stockholder in various theatrical companies which exhibited "Letty Lynton". As I understand, its relationship to those companies was in all instances that of a stockholder. On a total of about 100 companies, I am informed, though I have not checked this, that exhibited "Letty Lynton", Loew's Incorporated did have such an interest. In, I think, less than half of those companies, approximately 50, it was the sole stockholder; in other cases it was a partial stockholder, generally interested about one-half in those other companies.

Colloquy of Counsel.

A simple accounting by Loew's Incorporated will, of course, be an account of one page saying that it made nothing out of "Letty Lynton"; it did not produce; it did not distribute. 1345

If Mr. Driscoll is willing to let the matter rest at that point, of course, our problem is simple enough. Obviously, the general rule of law is that a stockholder as such is not liable for anything. It is its corporation that is the defendant. If, on the other hand, it should be ruled that an elaborate accounting by Loew's is in order to show profits, if there were profits, through its stockholdings in theatres which exhibited this picture and many others, that will be a vast task, I suppose much larger than the task which we have thus far completed, and I should like to know what Mr. Driscoll's desires are in that regard. 1346

Mr. Driscoll: Of course, I can't answer you and decide the form in which the accounting shall be made. It is entirely a problem for you to decide. It is right in your lap, whether or not you are going to put in a one-page account or a hundred pages. The Court has ordered Loew's Incorporated to account. You should comply with the order of the Circuit Court of Appeals. I am not acting as counsel for Loew's Incorporated and telling them what ought to be done; not acting as counsel for them. I don't want even to suggest. 1347

The Special Master: Mr. Pollak, you have put on the record here that Loew's has a stock interest in a lot of distributing companies.

Mr. Pollak: In distributing companies.

The Special Master: And exhibiting companies? They did apparently make profits out of the exhibiting "Letty Lynton".

Mr. Pollak: That is correct.

Colloquy of Counsel.

1348 The Special Master: Suppose you just put in a one-page account that you are talking about; what can I say about it?

Mr. Pollak: That is a problem. It proceeds on the simple proposition that a stockholder is not as such liable. The wrongdoer, if there is one who is the liable party in tort or contract, is the corporation which does the act. The stockholder suffers through an impairment of that corporation's finances. Mr. Driscoll has not chosen in this suit to sue any of the exhibiting companies. He has pending a suit against one other exhibit company, the Capitol Theatre.

1349 The Special Master: With reference to "Letty Lynton".

Mr. Pollak: Yes. The question I want to know from Mr. Driscoll is not what Loew's should do. It is quite clear what Loew's should do. The question is, if he objects to that form of accounting and insists upon a report on Loew's, a stockholder of corporations not themselves defendant, whether that problem, for instance, would have to be taken up with the District Court. I do not know. I am not sure that even that solution is satisfactory, because it is conceivable that if the District Court should hold against Mr. Driscoll, for instance, and should say that a showing that Loew's did no producing and no distributing satisfied the terms of the order, it is conceivable that a higher Court may hold otherwise. Nothing can take care of this situation except the statement of Mr. Driscoll that a definite statement by Loew's that it did no producing or distributing and had no connection with "Letty Lynton" otherwise than as already shown as a stockholder in one or two of these companies that are defendant, whether that will satisfy him. If it does, we can be through by June 28th.

Colloquy of Counsel.

Mr. Driscoll: In other words, you want me to waive any claim I may have against Loew's Incorporated. 12

Mr. Pollak: You understand the problem entirely?

The Special Master: I certainly do.

Mr. Pollak: You understand how it does affect the entire schedule from top to bottom.

The Special Master: After all, if you are going to introduce a one-page accounting on behalf of Loew's Incorporated, which is going to state that you have no income from this picture, and the record shows that you were the sole stockholder of a substantial number of exhibitors, what is going to be my finding? Suppose I find that Loew's was sole stockholder of fifty exhibitors, what is the District Court going to say to me if it takes the position that Loew's is accountable for any interest that it has in them? 13

Mr. Pollak: I agree that it leaves you in a difficult position.

The Special Master: You are not going to take my judgment one way or the other, but it is my duty to make the findings, take evidence on all facts and make the findings sufficient so that the Court won't have to send it back again to a Special Master. 13

Mr. Pollak: I don't dispute any of it. In fact I rather stress it. And that is why I say Mr. Driscoll cannot insist on two things, as they are absolutely inconsistent. The two things that are absolutely inconsistent are a speedy determination of this accounting and the inclusion of Loew's in it.

The Special Master: Why don't you put in that one page accounting and force Mr. Driscoll to disclose his position?

Mr. Driscoll: I will disclose my position now. I

Colloquy of Counsel.

1354

say that Loew's ought to be held liable, and the Circuit Court of Appeals has said so in the first instance. Mr. Pollak wants me to waive that.

The Special Master: You refuse to do that?

Mr. Driscoll: Yes.

The Special Master: And since Mr. Driscoll takes that position in regard to Loew's, what do you believe you will have to do to preserve your rights?

1355

Mr. Pollak: I believe that I shall have to present an accounting of the sort I have suggested, just setting forth that Loew's Inc. has no interest in production, distribution or exhibition except as stockholder in the theatres which exhibited and, as already shown, in one or two distributing companies; that it was the stockholder of such and such stockholding in theatres A, B and C and so on through the alphabet; that it was the stockholder in theatres X, Y and Z, as sole stockholder in those theatres; that those theatres did exhibit "Letty Lynton"; that presumably some of them made profits by exhibiting "Letty Lynton"; and then the problem would be as to which theatre to select, if you really want to have a record—and maybe you do, Mr. Master; I always believed you might—if you want to have a record that as far as is humanly obtainable will never call for a retrial, whatever view is taken by any court.

1356

The Special Master: I am clear that in this case, with justice to the plaintiffs, this case ought never to have to come back to a Special Master again. I am going to try, I hope with your assistance, to have it in such shape that all of the facts that could assist the Court will be set forth. I don't think there is any justification in sending this case back to a Master.

(Discussion off the record.)

The Special Master: In order to protect your

Colloquy of Counsel.

rights when Mr. Driscoll objects to this one page accounting of Loew's, what are you going to do then? 1357

Mr. Pollak: If you tell me to put in a fuller account, an account for each of these theatres, on the ground that you want a record with findings that will prevent any possible retrial, I don't see there is anything possible to do except to give you that account. The only possible way, I think, is for the Circuit Court of Appeals itself to amend its mandate, because I do not believe the District Court would have authority in a matter on which the Circuit Court of Appeals had passed—unless, of course, Mr. Driscoll consented—but he does not appear to be in a consensive mood. 1358

(Discussion off the record.)

Mr. Driscoll: It is entirely up to him as to the method in which the Loew accounting is made. I say, he is ordered to make an accounting, and I say if there is a one-page account put in it is not an accounting.

The Special Master: On that basis, what are you going to do, irrespective of what I think?

Mr. Pollak: Your Honor might want to go with us or without us to the District Court in that situation, especially in view of Mr. Driscoll's explanation that the Circuit Court of Appeals did think that even after its reversal up there the form of the accounting was in the hands of the District Court. 1359

The Special Master: But the trouble in doing that is that they will say, "What is your record? The only record you show is that there is a statement made by counsel for Loew's that Loew's has a 100 per cent. interest in certain of these exhibition companies. We are not going to pass on that main question in the case until it comes before us with your findings."

Colloquy of Counsel.

1360 Mr. Pollak: My feeling is that there is nothing to do until Mr. Driscoll challenges that accounting. The Special Master: He has challenged it.

Mr. Pollak: If he is going to challenge it, then we will have to account for these theatres.

Mr. Driscoll: Why shouldn't they account? Under the decisions everyone that assists in any way in the use of that picture is a joint tort feisor and is liable. They are liable anyway under the decree. On the trial of this case they testified on cross examination that when they were acting they were acting for all these corporations.

1361 The Special Master: I think so far as we are concerned here you have to file an accounting of Loew's, just as much as you have got to file an accounting of the foreign subsidiaries.

Mr. Pollak: It is something of the same problem.

The Special Master: If you are satisfied to stand on just a one-page account, that's your business. On the other hand, when you put it up to me, I don't know how the District Court or the Circuit Court of Appeals is going to decide in an equity case as to the liability of Loew's. I think I have got to take the evidence.

(Discussion off the record.)

1362 Mr. Pollak: We will submit an account at the next hearing.

HEARING OF JUNE 16, 1937.

Mr. Pollak: Mr. Master, with that out of the way, we have come to the problem mentioned at the last hearing of the accounting that has thus far been ordered by Loew's Inc. The present status is as follows: The account that seems to the defendants

Colloquy of Counsel.

the correct account for Loew's I have here. It is, as I stated it would be, a mere showing that Loew's connection with this situation is simply a passive one, that of a stockholder in numerous theatres exhibiting "Letty Lynton", many though not all of those theatres owned by corporations in which Loew's is the sole stockholder, other theatres owned by corporations in which immediately or through the mediation of one or more corporations Loew's is a partial stockholder.

1363

As has already appeared, Loew's is also a stockholder in one or two of the other defendants. Your Honor recalls that.

As we view the law, and with this statement of fact which I do not understand is challenged, I will also add, simply for the sake of clarity, the concession of fact, if it is deemed a concession, that Loew's exercises its ordinary function of participating in the choice of directors. In the case of corporations solely owned by Loew's the directors of the operating companies are, I think, officials connected with the Loew corporation.

1364

If your Honor feels, of course, that this accounting that I have here prepared showing simply the stock ownership—when I say I have prepared, Mr. Mills and his associates have prepared—is sufficient accounting to establish there is no liability of Loew's, which we believe is the clear legal rule, these discussions concerning the method of accounting if no accounting further is ordered will become academic; and on that point of law of course your Honor understands the underlying principle perfectly clearly. A claim for copyright infringement, whether primarily as a claim for damages or profits, is a claim to recover by reason of a tort. Your Honor, of course, knows that the stockholder of a corpora-

1365

Colloquy of Counsel.

1366

tion is not as such liable for its torts. He is not as such liable for its torts if he is the sole stockholder. If any other tort were claimed to have been perpetrated by any one of these exhibiting theatres, the claimant would sue the exhibiting theatre.

If someone were injured by a truck belonging to the Diamond Amusement Corporation, which happens to be the first on the list, that operates the Alpine Theatre, of course he would sue the Alpine Theatre, not sue the stockholders. The stockholder's estate might be diminished by the recovery, but liability would not thereby be created by virtue of injury claimed or proved as to any person.

1367

The Special Master: Let us hear what Mr. Driscoll has to say to that.

Mr. Pollak: If I might say just one word more, as an illustration that the rule is no different in copyright cases and that the plaintiff well understands this, I refer to the fact that the plaintiff is right now suing one of these corporations, a corporation that appears on this list, a separate litigation, tried last week but not decided.

The Special Master: With respect to "Letty Lynton"?

1368

Mr. Pollak: With respect to "Letty Lynton", and he is suing The Moredall Company, Moredall Realty Corporation which operates the Capitol Theatre. The Moredall company is itself held in part by Metro-Goldwyn Pictures Corporation, which is itself held by M. G. M. Inc., which is itself held by Loew's Inc. and which appears on the list. That is our case on these issues.

The Special Master: What is the suit for?

Mr. Pollak: For infringement and account of profits, originally for damages, but it was amended at the trial. They claim an accounting of profits.

Colloquy of Counsel.

The Special Master: You offer the accounting of Loew's? 1369

Mr. Pollak: Yes. Would you mark this for us?

Mr. Driscoll: May I see it before it is marked?

Mr. Pollak: Certainly (paper handed to Mr. Driscoll).

Mr. Driscoll: I have no objection to this paper that is now being offered as an exhibit being received for what it is worth, but I do object if it is to be received as a complete accounting for Loew's Inc., on the ground that it is not a compliance with the orders of the Court.

The Special Master: Mark it subject to the plaintiffs' objections. 1370

(The paper just offered was received in evidence and marked Defendants' Exhibit L-1, of this date.)

Mr. Driscoll: Answering Mr. Pollak's statement, it is true that since our last session here we tried out the Moredall case. The case of Sheldon against Moredall Amusement Company was started about the same time as this action here, maybe a matter of weeks or months after this action was begun, based on the showing of the picture at the Capitol Theatre in New York City. I have not any doubt in my mind but what we could in the same manner begin similar actions against each and every one of the Loew corporations that has shown this picture. In fact, Judge Patterson from the bench said that each exhibitor was a tortfeasor. I do not think that anyone can seriously disprove that. 1371

That does not prove or disprove our right to our relief here in this suit against Loew's Inc. It is just thrown in. It does not mean anything. It is all right to say that the Diamond Amusement Company,

Colloquy of Counsel.

running the Alpine Theatre, has played this picture and that we have to go after the Diamond Amusement Company; and that the Ruby Company running the Rocky Mountain Theatre, another one, we have to go after that, although that was owned a hundred per cent. by Loew's Inc. But I do not think that is the law.

The Circuit Court of Appeals has held Loew's Inc. liable in this case and ordered an accounting. Loew's, therefore, has been held guilty. Now, then, Loew's comes into court and says, "That is all right, but we did not do this personally; a 100 per cent. owned corporation of ours is the one that did it." Mr. Pollak looks at this problem from the other end of the telescope. We all know and are free to admit that one of the main purposes of corporations is limiting liability. There is not any question about that. But that is not your situation here at all. If we were trying to hold Loew's Inc. by going through the other end we might have a more difficult situation. For instance, if we sued Moredall and if we sued Diamond Amusement and if we sued the others and we said we have shown these others are guilty and we want a decree against Loew's Inc., the Court might agree with what he has said. It is not an effort to hold Loew's Inc. guilty. It has been held guilty of selling our picture and it has been ordered to account for profits, and it says, "I do not have to account for profits; all my profits come from A, B, C, D, E and F, 100 per cent. owned subsidiaries." Well, it just does not hold water. It might get those profits from these subsidiaries and still have to account for them. He just goes after that problem from the wrong end. We are not trying to hold Loew's Inc. They have been held liable and they have been ordered to account by the Circuit Court of Appeals.

Colloquy of Counsel.

It is up to them to report what moneys came into their hands by way of profits as the result of this showing of this picture, through their agencies. These subsidiaries are in fact their agencies and there is not any escape from that.

1375

I admit we can't get together with the opposition on any basis they have thus far suggested.

The Special Master: Let us wait on that for a moment. You have raised a question of law, as to the liability in this action of Loew's for the acts of its wholly owned subsidiaries.

Mr. Pollak: And of subsidiaries, if you want to call them subsidiaries at all, that are partially owned corporations.

1376

The Special Master: Is it my function to decide that question of law one way or the other at this particular moment? Suppose I say I agree 100 per cent. with Mr. Pollak on the question of law and I refuse to take any evidence or to compel any evidence with reference to the profits of these subsidiary companies in this action, and then suppose the District Court or the Circuit Court of Appeals disagreed with me completely. They would send it back for a new accounting.

Now, supposing I said I agreed with Mr. Driscoll 100 per cent. that Loew's should be forced to account here, and they put in this accounting and the District Court or the Circuit Court of Appeals said, "Yes, we agree with you;" then they would have all the facts. If they say, "You are wrong in your law. The Master should not have taken any of that evidence," where is the harm? It has extended these hearings for a certain length of time due to my mistaken knowledge of the law, but isn't it better to extend these hearings now, and isn't it fairer to extend them now than to close them at this point

1377

Colloquy of Counsel.

1378

completely and if I am wrong to have the whole thing sent back for further hearings?

1379

The reason I think it is better is that this case has been interminable, apparently. I am not blaming anyone for it one way or the other. But it seems it has dragged out five years, I am told.—Isn't it my duty to do everything I can to shorten the period, then within which this case will be finally determined? If I refuse to force Loew's to account for these subsidiaries I take the chance of dragging out this case for a great deal longer. If I insist that Loew's account, I drag these hearings, possibly, but I put a final date on the final determination of this controversy and I certainly shorten it.

My inclination is that I do everything possible to shorten the period within which this case will be finally determined. I do not believe it is my function to decide such an important question of law in such a way as to prevent the fullest kind of an account.

1380

Mr. Pollak: Your Honor, of course, the procedural question involved is one that is before you to determine. The considerations that you have adduced that full accounting by us as to each of these theatres will produce a record that will, as far as human foresight can provide, be the last record, the only record—there is no doubt those considerations are most cogent. I suggest in opposition to those considerations simply this,—the combination of two considerations; one of them is that the point of law that is raised seems, to us at least, an exceedingly simple one. The other is that the further hearings that will have to be held, in view of the very natural inability of counsel on the two sides to agree on how to allocate overhead as to these theatres, for instance, among the fifty

Colloquy of Counsel.

or a hundred productions that a given theatre has in a year—and as your Honor recalls that “Letty Lynton” ran for a week or part of a week only—it occurred to me that perhaps you would feel that the issue of law was so simple and the burden and expense of accounting and the delay resulting from it would be so great, that you would in this particular instance want to run the risk of making a decisive ruling on the evidence and at this point which would obviate the necessity of going ahead. 1381

The Special Master: It is Mr. Driscoll's attitude that the law is simple on his side.

Mr. Pollak: Your Honor of course understands the procedural situation in the Circuit Court of Appeals to which Mr. Driscoll made reference. What happened was this. In the District Court Judge Woolsey found no infringement at all and, therefore, no liability. Appeal was taken by Mr. Driscoll and taken successfully. The issue that was contested in the Circuit Court of Appeals was not the issue whether there was liability by anybody, but whether there had been any infringement. The question of liability by anyone and how it was to be determined and who would share in it is a question that would naturally arise, as it has arisen, after accounting has been ordered. 1382

Mr. Driscoll: I do not agree with that at all. That is carrying it too far. As a matter of fact, on the trial of the action before Judge Woolsey, Mr. Rabin testified that what was done was on behalf of all the defendants jointly, and there was not any escape from it; and I stopped there when I had that *prima facie* evidence of liability of all the defendants equally. That was the record that went to the Circuit Court of Appeals, and they had no escape from it. 1383

Colloquy of Counsel.

The Special Master: Perhaps there is some testimony adduced at the trial which would make it simpler for me to decide this question one way or the other.

Mr. Driscoll: I don't believe there is any testimony adduced at the trial that will assist you at all in deciding this particular question. The only testimony adduced at the trial that bore even indirectly on this was the testimony that would make Loew's Inc. a joint tortfeasor with the other defendants named. Now that has been settled judicially and Loew's has been held to be jointly liable and ordered to account. We get down to the subsequent question that arises for the first time as to how Loew's is to account. That is the question before us, which is an entirely different question than the question that was on trial before Judge Woolsey.

Mr. Pollak's statement that upon that trial we naturally could not litigate which defendants were liable—why, there isn't anything to that. That trial was the place to litigate as to which defendants were the ones liable. Any one of them might have taken the position that it was not liable and moved for a dismissal at the end of the case. None of them did. They stood jointly. They elected to stand jointly, and when the case ended they were all held together.

The Special Master: Let me ask you. Mr. Pollak has submitted this accounting. You object to it and claim it is not a full accounting of Loew's?

Mr. Driscoll: That is correct.

The Special Master: Is it my function as a master, or have I the authority as a master, to say to Mr. Pollak, "I do not regard this as a full account of Loew's at this particular time and I desire you

Colloquy of Counsel.

to put in testimony with reference to the profits of these theatres." Have I the right to do that?

1387

Mr. Driscoll: I say the alternative is this: If, for instance, you have not that right, then I certainly have the right to subpoena the officers of Loew's and the books and adduce the facts.

The Special Master: I think he has got that right. I don't know whether I have got the right under the broad powers of a master to develop testimony.

Mr. Driscoll: The only thing I have to do is to prove the gross receipts.

The Special Master: I don't know whether I have the right. I would rather not exercise any direction as to what the parties do with reference to their testimony.

1388

Mr. Pollak: Mr. Master, I will say this: whether you technically have the right, our point will certainly not be a question of your right. Our application really is to your discretion. But the position I take is this: The order of the Circuit Court of Appeals does establish, as it stands at present, and places on each defendant the duty to account. We have never disputed that, of course. We think that this is a sufficient account. We have never litigated the question as to whether, for instance, one of the defendants had any relation to the situation whatever. If a defendant had been named through inadvertance which had never been connected with "Letty Lynton" in any shape or manner, we might have litigated that question.

1389

There was no election of the defendants to stand together. There was a contention that there had been no infringement of copyright.

Mr. Driscoll: There was testimony by Mr. Rubin on my cross examination, that all of the defendants stood together.

Colloquy of Counsel.

00 The Special Master: If you have that testimony I should like to see it.

Mr. Pollak: The testimony, as I recall from simply looking through the record, is testimony of Mr. Rubin as to the character of the organization of the various companies that were defendants.

The Special Master: Mr. Pollak, by filing this Defendants' Exhibit L-1 you really are filing a statement which you say supports your theory that Loew's does not have to account.

91 Mr. Pollak: Not quite, Mr. Master. I say that this document shows that the accounting defendant, Loew's Inc. by no possibility can be liable either for any damages or any profits; that this document, which certainly was not before the Circuit Court of Appeals, establishes that the only relation of Loew's to this situation is that of stockholder.

The Special Master: And, on the theory that a stockholder is not liable for the torts of his corporation, therefore, is not required to file any further account. On the other hand, you have stated here and put me on notice at the last hearing that this particular picture was exhibited in all these theatres.

Mr. Pollak: Yes.

92 The Special Master: Even on that statement could I take the account of any profits that may have been made by the exhibition of this picture and which would inure to the benefit of the stockholders?

Mr. Pollak: Of course, as it seems to us, if you should be satisfied that a stockholder as stockholder is not liable, the showing now having been made that the only relation is that of stockholder, you could now be satisfied that there could by no possibility be any profits for which the stockholder merely as stockholder should account.

Colloquy of Counsel.

The Special Master: If I take that position I would have to deny Mr. Driscoll's request for a subpoena of these books, wouldn't I? 1393

Mr. Pollak: Yes.

The Special Master: I just can't see it is my duty to do that. It seems to me that the consideration of presenting a full case to the higher court outweighs any other consideration in this case.

Mr. Pollak: Your Honor will, of course, grant me an exception on this?

The Special Master: Certainly. There has been a tremendous amount of evidence put in in this case which Mr. Driscoll claims is entirely and wholly incompetent, and it has all gone in. You claim that this evidence that Mr. Driscoll wants in is incompetent, but I think it is my duty to take it. 1394

Mr. Pollak: In order to save time, will your Honor allow me at this point a separate exception to the introduction of any evidence concerning the profits of each one of these exhibiting theatre corporations?

The Special Master: Certainly.

Mr. Pollak: Mr. Driscoll will not call for any repetition of exceptions? 1395

Mr. Driscoll: No.

Mr. Pollak: With a specific exception also, added to the general objection which includes all the theatres, a specific objection in the case of some of these theatres as to which the stock interest was less than 100 per cent.

The Special Master: Certainly.

Mr. Pollak: And the specific exception includes certain theatres—there are six—where the stock interest, whatever its proportion, was subordinate

Colloquy of Counsel.

to the outstanding preferred stock interest in the hands of the public; and a specific exception in the case of those theatres listed on page 3 of the exhibit in which Loew's Inc. had no direct interest in the stock of the operating theatre company but an interest only as holder of stock of a corporation which itself held stock in the operating company, or in some instances an interest only as the holder of stock of a corporation which itself held stock in a corporation which itself held stock in the operating company. And finally, if your Honor please, specifically to the case of the Moredall Realty Corporation which operated the Capitol Theatre, on the grounds above stated that the ownership of stock was only intermediate, plus the special ground in that case suit is now actually pending and for some five years has been pending against the Moredall Realty Corporation.

Mr. Driscoll: It is.

The Special Master: I don't know anything about the suit against the Moredall Corporation, but my inclination would be to keep that testimony out altogether. What do you say about that, Mr. Driscoll?

Mr. Driscoll: I don't care anything about Moredall. It is a separate piece of litigation. I do not ask to bring that in.

The Special Master: I don't think any testimony should be offered with reference to Moredall.

Mr. Pollak: I understand Mr. Driscoll has acquiesced.

Mr. Driscoll: It is satisfactory to me.

The Special Master: All of those exceptions are noted, as stated by Mr. Pollak.

Mr. Pollak: And without need to repeat them at any time.

Jesse T. Mills—for Defendants—Recalled—Direct.

The Special Master: And no testimony with reference to the Moredall Corporation will be introduced in this hearing. 1399

JESSE T. MILLS, resumed:

Direct examination by Mr. Pollak:

Q. Mr. Mills, you have shown me a document headed, Theatre—Metropolitan; what is this document (referring to document produced by the witness)? A. That is a photostatic copy of the weekly statement of the Metropolitan Theatre in Brooklyn showing the result of the operations for the week ended May 20, 1932, during which entire week the picture "Letty Lynton" was shown at that theatre. 1400

Mr. Pollak: I offer it in evidence.

Mr. Driscoll: May I ask a few questions?

By Mr. Driscoll:

Q. That, Mr. Mills, is really a photostat of a report gotten up by the manager of the theatre and submitted to the company itself? A. That is right. 1401

(The document just offered was received in evidence and marked Defendants' Exhibit L-2, of this date.)

By Mr. Pollak:

Q. Mr. Mills, if you happen to know, there is an item in the lower right-hand corner marked Overhead. Has it been explained to plaintiffs' counsel, off the record,

Jesse T. Mills—for Defendants—Recalled—Direct.

1402 that that figure of overhead which is here \$3,430 is computed on a 40-week basis in this report? A. That is correct.

Mr. Pollak: I think it will simplify matters for your Honor to know that in the computations that we are going to present for each theatre we are computing overhead on a 52-week basis instead of a 40-week basis. The change is somewhat favorable to the plaintiff.

Q. The 40-week basis is actually used in the business?

A. It is.

1403 Q. On the theory that the theatre is closed or less active during the other twelve weeks? A. Yes.

Q. Have you made a computation of the overhead in regard to the Metropolitan Theatre? A. Yes.

Q. On a 52-week basis? A. Yes (producing paper).

Mr. Pollak: I offer it in evidence.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. L-3, of this date.)

1404 Q. This computation of overhead is based upon an actual analysis of the expenses of the corporation for a year, isn't it? A. For the year ending August 31, 1932.

Q. The amount of overhead appearing on L-2 is \$3,430 was an estimated figure made up at the time, I suppose?

A. And on a 40-week basis.

Q. And on a 40-week basis? A. Yes.

Q. You said that Exhibit L-2, which is the weekly report, is a photostat of a document prepared at the time?

A. That is correct.

Q. Returning to Exhibit L-3, have you a copy for Mr. Driscoll? A. No. We can make one.

Jesse T. Mills—for Defendants—Recalled—Direct.

Mr. Pollak: Referring to Exhibit L-3, I will ask Mr. Driscoll if it prima facie proves the matter set forth, and if he wishes any further testimony. 1405

Mr. Driscoll: I can better judge after I look over the Exhibit L-2. The only way I can do that is to get photostats.

Mr. Pollak: We will have them.

Mr. Driscoll: I need an opportunity to study them. I can't assimilate all this at a glance.

Q. On Exhibit L-3, of which you will have a copy, the item Insurance Premium, \$5,495.81, means the insurance paid upon that theatre for that year? A. Insurance accrued for the year as distinguished from payments. You might pay insurance premiums for two years with one check. 1406

Q. The real estate taxes would represent actual accrued obligations? A. That represents actual payments.

Q. The interest on mortgage means an accrued obligation? A. Yes.

Q. The item of interest on net investment? A: That is the interest on the net equity of the corporation in the property, the fixed assets, consisting of land, building and equipment, less reserve for depreciation and less the amount of the mortgage, calculated at six per cent.

Q. Now as to the item of depreciation of building and equipment, on what rate have you depreciated the building there? A. Three per cent. on the building. 1407

Q. And on the equipment? A. Three per cent. on building equipment and ten per cent. on theatre equipment.

Q. How do you distinguish between building equipment and theatre equipment? A. The building equipment in this instance is merely equipment which becomes a fixed part of the building rather than the movable equipment. The boiler plant would go in as building equipment, the cooling plant I believe would go in as building equipment, such items.

Jesse T. Mills—for Defendants—Recalled—Direct.

1408 Q. Now, the item of Sundry Expense is small. A. Yes.

Mr. Pollak: Do you want to bother with that, Arthur?

Mr. Driscoll: No.

Q. You have deducted from gross expense for the year ascribable to overhead, \$158,606.53, certain items of income. I find an item of \$11,473.42 of rent income. I do not think Mr. Driscoll will criticize any deduction, but I would like to know what that rent income means? A. That is rent income from commercial space in connection with the theatres, most theatres have a certain amount of rentable space not used for theatres, in the way of lofts or stores, more, particularly, stores.

1409

Q. Taking Exhibits L-2 and L-3, can you show what the profits, after deducting overhead items as now computed, from the exhibition of "Letty Lynton" at the Metropolitan Theatre, were?

Mr. Driscoll: Doesn't that show on Exhibit L-2?

The Special Master: He has changed the overhead.

A. I can show what the profits were from the operations of the theatre for the week during which "Letty Lynton" was shown.

1410

Q. By the way, there were other things shown besides "Letty Lynton", weren't there? A. There were. They are listed on the statement, the various other attractions, in the third column.

The Special Master: Who got the \$2,000 which you have listed against "Letty Lynton"?

The Witness: Metro-Goldwyn Distributing Corporation.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. That is of course, an item included under a prior 1411
accounting of the intake of that Corporation? A. It was.

Mr. Pollak: Now there arises a fundamental problem as to which we have tried to come to an agreement, but naturally have not—anyway, we have not. We are taking, as your Honor understands, this theatre as an illustration chosen almost at random to illustrate the problems which will arise.

The Special Master: I understand.

By the Special Master:

Q. Let me ask you this. You paid \$2,000 for "Letty 1412
Lynton", and according to this statement you paid \$5,500
odd for all talent at that theatre? A. May I see that
(paper handed to the witness): That is correct.

Q. And at the end of the week, with a readjusted over-
head, the theatre made \$2,100, I think. I am talking
roughly. Is that correct? A. That is correct.

The Special Master: Now, with those facts be-
fore you, have counsel been able to adopt any for-
mula with reference to this?

Mr. Driscoll: No. We contend the cost of 1413
the other acts or whatever they might have been,
music or what not, during the week, goes in as
a part of the expense of the week which they have
deducted. But they are not entitled under the
decisions to split up the net of \$2,100 they speak
of. They are entitled to take off the cost of the
other acts, but they are not entitled to split up the
\$2,100 in any way.

Mr. Pollak: And we say, if your Honor please,
we know of no decision that will lend the least
support to such a contention; and we say that the
very fact that the contention is made might illustrate

Colloquy of Counsel.

1414

the underlying policy of the plaintiffs' whole claim not only against Loew's Inc. but as well against the other defendants. Because the essential position of the plaintiffs right along is that in an infringement, even though contributing to the result as we have already seen in the case of production and we now see in the case of exhibitions comes from sources absolutely innocent and unexceptionable, that they can take all the profits. It is one of reductio ad absurdum. It emerges right here, but applies equally well in the other position too.

1415

The Special Master: That, of course, I suppose is a question of law.

Mr. Driscoll: That is right.

The Special Master: All I am trying to do now is to shorten this proof. You can argue your question of law later. Am I right in saying that under Mr. Driscoll's theory the \$2,100 is attributable to and should be accounted for as profits out of this thing, or that some rough figure of 20/55ths of \$2,100 should be attributable to "Letty Lynton" if you take it according to the expenses, or some arbitrary computation of that sort should be made? What is your contention? Assuming that Loew's is responsible, what do you say they are responsible for of that \$2,100?

1416

Mr. Pollak: May I, before categorically answering your question, bring out certain facts?

The Special Master: The only thing I am trying to do is to shorten this proof. Perhaps it can't be done.

Mr. Driscoll: I was going to say this, if I am permitted to get in a word. It seems to me that your Honor is entirely right here. This does not depend upon any extraneous facts that may be developed through this witness or any other witness.

Colloquy of Counsel.

or calling in experts to divide this thing up between the various attractions. It is a question of law. It seems to me that we can shorten this case. This was a suggestion of mine to Mr. Cohen before. Out of these one hundred theatres all they need to do is to have a photostatic copy of the manager's report for the week, which is in evidence in this case here, and the breakdown of the overhead. So far as we are concerned, we are not going to ask for any further information or testimony unless there is something suspicious or something that we feel compelled to question as not being clear. But those two sheets will constitute a complete report for each one of these hundred.

1417

The Special Master: On your statement is it your belief that you have to bring out additional information with reference to these sheets, or can we just stick in those sheets and argue your question of law later on?

1418

Mr. Pollak: I think the sheets will pretty well speak for themselves, if I can show the facts that support our views that some apportionment should be made among the attractions.

The Special Master: Can you do that in general terms or do you have to do that with reference to every attraction?

1419

Mr. Pollak: I think I can do that in general terms.

Mr. Driscoll: That is a question of law.

Mr. Pollak: It is a question of law that depends on the facts.

The Special Master: I think he is entitled to put it in.

Mr. Pollak: The answer to your question as to what our theory is, I will say that as a simple, practical matter we have proposed on an arbitrary

Colloquy of Counsel.

basis to give to "Letty Lynton", which in general was the feature, a two-thirds sharing of the profits for the week, that is to say, 66-2/3rds to "Letty Lynton" and 33-1/3rd to the other things whatever they were, vaudeville, shorts, sometimes a double feature, news reels and everything. We were unable to come to an agreement on that.

The Special Master: It comes down to the question as to whether, according to Mr. Driscoll, it should be the entire thing, or, according to you, two thirds.

Mr. Driscoll: I have never heard the two-thirds before.

Mr. Pollak: We think two-thirds is more than generous.

The Special Master: Are you willing to agree to the two-thirds?

Mr. Pollak: We do, but we want to produce this evidence.

The Special Master: Are you willing to stipulate that if there is a recovery against Loew's for this transaction you would be satisfied with a two-thirds?

Mr. Pollak: Yes.

The Special Master: And Mr. Driscoll says he is not satisfied with that; he wants 100 per cent.

Mr. Driscoll: Yes.

The Special Master: That is narrowing it a little. Can I hold you to this? I don't want to embarrass you.

Mr. Pollak: There is only one qualification to this. Your Honor understands that besides our contention that there should be apportionment among the attractions on the basis of two-thirds to "Letty Lynton" and one-third to the other attractions, we also contend that, with respect to the

Jesse T. Mills—for Defendants—Recalled—Direct.

exhibition of "Letty Lynton" much as we contended with regard to the production and distribution of "Letty Lynton", that "Letty Lynton's" own share of the profits in this accounting is recoverable only in proportion of plaintiffs' infringed work's contribution to the result. Have I made myself clear on that?

1423\

The Special Master: It is entirely clear.

Mr. Pollak: And the point also that we deny that this stockholder is liable at all. I think with those explanations we understand each other. I am perfectly willing to take two-thirds' assignment to "Letty Lynton". We might want to show what these other attractions were, that varied from theatre to theatre.

1424 /

By Mr. Pollak:

Q. Generally speaking, Mr. Mills, is this true, that the ordinary playing time of one of these theatres would be about two and a half hours or more, up to three hours? A. Ordinary playing time.

Q. The time that it took "Letty Lynton" to run was 84 minutes, wasn't it? A. Approximately.

Q. It is not only approximately; it has been measured. That is correct, isn't it, Mr. Mills?

1425

Mr. Driscoll: Perhaps he doesn't know.

Mr. Pollak: Subject to correction, will you take my statement, Arthur?

Mr. Driscoll: Yes.

Q. Am I right in this, Mr. Mills, that audiences, so far as is known, go on to an exhibiting theatre for a combination of attractions?

Jesse T. Mills—for Defendants—Recalled—Direct.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, unless this witness can qualify as the average audience.

The Special Master: If you want the answer, certainly Mr. Mills is in the movie business and he can give his opinion.

Mr. Pollak: I don't want his opinion; I think it is self-evident.

Mr. Driscoll: If he knew the answer to that one he could get any salary he wanted.

The Special Master: Read the question.

(The pending question was read.)

Mr. Driscoll: Do you overrule my objection?

The Special Master: I don't like that kind of testimony coming from Mr. Mills. Mr. Mills is supposed to be a great auditor.

Q. This you do know, Mr. Mills, do you not, that the theatres referred to in the list Exhibit L-1 make payments for other attractions besides the feature, and do so for business reasons? A. Yes.

Q. Do you happen to know what Release Metrotone 266 was? A. That was the news reel.

Q. And the same for Release Metrotone 267; that was also a news reel? A. Yes.

Q. Between them they ran for the whole week, one for four days and one for three. What is Columbia Snap Shots No. 8? Can we agree that it was a short?

Mr. Driscoll: Yes, a short gotten out by Columbia and shown at that theatre during that week.

Q. What is Metro Nickel Nurser? A. A comedy.

Q. That is all that are listed under films, either "Letty Lynton" herself or shorts or the trailer of "Letty Lynton"? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. On Exhibit L-2 you have told us about all that appeared under the caption Films, and there is in this instance the one feature, a certain short and an item of trailer for the feature which is carried as an expense because it was incurred in connection with that week's production? A. Yes.

1429

Q. Under the heading of Acts I find first Dave Gould's Boys and Girls. What is that? A. That is the title of an act. Each of those captions is the title in which the act was presented on the stage, advertised.

Q. Acts meaning performances by living performers? A. Yes, ordinarily known as vaudeville.

Q. Without going into the detail of this, I find here six different acts, each of which was separately paid for. Your testimony that has been given in regard to Dave Gould's Boys and Girls would go for the other five? A. Yes.

1430

Mr. Pollak: Mr. Driscoll, would you stipulate, subject to objection and exception by you to the relevancy and materiality of such testimony, that defendants could produce an expert in the exhibition of pictures who would testify that the picture-going public goes in part for attractions other than the feature, and particularly in theatres where vaudeville is shown goes in large part by reason of the vaudeville, and the children especially go in part and the parents who accompany the children go in part also to see the shorts?

1431

Mr. Driscoll: Subject to the objection that it is immaterial, I will stipulate that you could produce such a witness.

Mr. Pollak: In the form in which I have stated it?

Mr. Driscoll: In the form in which you have stated

Jesse T. Mills—for Defendants—Recalled—Direct.

1432 Q. I show you, Mr. Mills, a photostat and ask you what that represents (handing paper to the witness).
 A. That is a photostatic copy of the weekly statement rendered by the manager of the Lexington Theatre for the week ending May 20, 1932, during a part of which week "Letty Lynton" was shown at that theatre, and specifically on the three days of Saturday, Sunday and Monday, 14th, 15th and 16th of May, 1932.

Q. And the last theatre with which we dealt was a theatre in which "Letty Lynton" appeared for the whole week? A. That is correct.

1433 Mr. Pollak: I ask to have this marked in evidence.

(The document just presented was received in evidence and marked Defendants' Exhibit No. L-4; of this date.)

Mr. Pollak: To shorten this, may we explain as to every one of these weekly reports, of which there will be about 100, I suppose, that the item Overhead in each instance means the then estimated overhead and estimated on a 40-week basis, and that in each instance it will be superseded by the exact computation of overhead on a 52-week basis.

1434 By the Special Master:

Q. That is the only time it ever appeared at the Lexington? A. That is correct.

By Mr. Pollak:

Q. For the Lexington Theatre, Mr. Mills, have you made a computation of overhead? A. I have.

Jesse T. Mills—for Defendants—Recalled—Direct.

Q. This is a computation given on a weekly basis, 1435
isn't it? A. It is the total overhead expense for the
year ending August 31, 1932, and the additional figure
shows 1/52nd part of that total, which is the overhead
for the week.

Mr. Pollak: I offer it in evidence.

(The paper just offered was received in evi-
dence and marked Defendants' Exhibit No. L-5,
of this date.)

Q. Mr. Mills, I suppose the item Insurance Premiums 1436
is the same as in the similar case of Metropolitan Thea-
tre? A. On the same principle.

Q. And so as to real estate taxes? A. Yes.

Q. And also as to interest on mortgages? A. Yes.

Q. And also as to interest on net investment? A.
Right.

Q. And also as to depreciation of building and equip-
ment? A. Right.

Q. In this case, Mr. Mills, the determination of income
that on any theory is ascribable to "Letty Lynton" is
somewhat different from the last case, where "Letty Lynton"
ran for the whole week, is it not? A. You are now referring
to the weekly statement and not to the overhead schedule?

Q. I am referring to the combination of the weekly state- 1437
ment and overhead statement which would show profits
ascribable to "Letty Lynton". In the case of the Metro-
politan Theatre it can be readily ascertained by substituting
the new overhead figure in place of the 40-week figure? A.
Yes.

Q. That cannot be done in the case of a theatre where
"Letty Lynton" ran for part of a week only? A. Right.

Q. But can you, and will you, please, compute what
share of the profits of the week is due to the days on which
"Letty Lynton" appears? A. That can be done.

Jesse T. Mills—for Defendants—Recalled—Direct.

438 Q. Would you do it right now? A. I think so.

Mr. Pollak: We will do this in this one instance right here, but we will have to prepare a statement under our own theory on the others.

The Witness: I have the computation.

Q. Does that also allow for a reduction of the overhead expense to the fraction of the week in which "Letty Lynton" appears? A. It does.

Q. What is the result of that computation? A. The result of that computation shows that for the three days on which "Letty Lynton" was shown the net profits for those three days were \$2,612.23.

Q. Will you explain the theory on which that computation was made? A. The theory is as follows. I took the box office receipts for the entire week, which were \$11,267.65. The receipts for the three days on which "Letty Lynton" was shown were \$6,593.75, or 58.5 per cent of the total receipts for the week. Our total expenses for the week, starting off with overhead of \$2,629.39; we have general pay roll, \$1,165.35; what is ordinarily called their trade bills, which is the next column, where all classes of expense are listed, \$1,361.02, making the total expense for the week, including overhead applicable to both the three days in which "Letty Lynton" was shown and took in the six thousand odd dollars and the remaining days when they took in the difference of four thousand odd dollars, a total expense for the week of \$5,095.76.

440 Then took the 58½ per cent of this expense, the same ratio as the receipts of "Letty Lynton" bear to the receipts of the week. Taking the total expenses of the week unallocable otherwise, to give the total expense, we have \$2,981.02; 58½ per cent of that total expense; to which we add the shorts and news for the time that "Letty Lynton" shows, which is \$100.50; in other words, we are allocating wherever we can the direct expense and only allocating on the percentage basis where it cannot be allocated otherwise.

Jesse T. Mills—for Defendants—Recalled—Cross.

The feature "Letty Lynton" cost \$900. Adding the \$2, 1441
981.02, being the 58½ per cent of the general expenses including the overhead, to the cost of the shorts and the cost of the feature, makes a total cost of \$3,981.52 allocated to the showing of "Letty Lynton" in that week.

\$3,981.52 deducted from the gross receipts of the days on which "Letty Lynton" was shown, \$6,593.75, leaves a net profit allocable to the days on which "Letty Lynton" was shown of \$2,612.23.

Mr. Driscoll: May I ask a few questions there, your Honor?

Mr. Pollak: I think we may ask you for a stipulation first. I want to ask Mr. Driscoll to add 1442
to the stipulation concerning the expert witness; would you stipulate, Mr. Driscoll, that the defendants could produce an expert witness who would testify that in his judgment the public goes to movie houses on an average to the extent of one-third on account of attractions other than the feature—subject to your objection as to materiality and relevancy?

Mr. Driscoll: I won't stipulate to that. I don't think any sane expert could so testify.

Mr. Pollak: In other words, that part of the stipulation is refused? 1443

Mr. Driscoll: Decidedly.

Mr. Pollak: You want to cross examine Mr. Mills?

Mr. Driscoll: I want to ask a few questions.

Cross examination by Mr. Driscoll:

Q. What did you say was the net applicable to "Letty Lynton"? A. Net profit?

Mr. Pollak: At which theatre?

Jesse T. Mills—for Defendants—Recalled—Cross.

1444 Q. The Lexington. A. \$2,612.23.

Mr. Pollak: He said for the playing days on which "Letty Lynton" appeared. Is that correct?

Thes Witness: Yes.

Q. For those three days. In your first column, your pay roll, you have \$1,105.35. That is for a 7-day week? A. That is correct.

Q. In the next column you have headed here Trade Bills, including incidental bills like advertising, trailer, sign shop, maintenance and repair, supplies and other items, totalling \$1,361.02?

1445 Mr. Pollak: Do you mind giving the Exhibit?

Q. Exhibit L-4. That is also on a 7-day basis, isn't it? A. That is correct.

Q. In addition to that you have overhead of \$2,629.39, according to Exhibit L-5? A. That is correct.

Q. And that is on a 7-day basis? A. That is correct.

Q. Those items taken together total \$5,095.76? A. Yes.

Q. That is on a 7-day basis. Now, then, if reduced to a daily basis that would be about \$728 per day, is that correct? A. Dividing by 7 equals that.

Q. Dividing by 7 equals \$728? A. That is mathematical.

1446 Q. That is what you were doing, Mr. Mills? A. Not when I allocated my weekly expenses.

Q. You were testifying as an expert. I think you were testifying to this computation. That is what you were asked about. A. I didn't divide by 7.

Q. You were asked to explain what you had computed? A. Yes.

Q. That is what I am asking you. If you divide by 7 it will give you \$728; that is correct, isn't it? A. Yes.

Q. If we multiply that by 3 days that will be \$2,384? A. That is approximately correct.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Q. We have particular definite information as to the cost for the three days of the show, on the 14th, 15th and 16th; there is no confusion between those three days and the other days of the week for the cost of the show? A. That is correct. 1447

Q. The cost of the show is \$1,000.50? A. Yes.

Mr. Pollak: That is direct cost.

Q. The direct cost of the show. So that if we take the overhead on this basis, plus the payroll, plus the trade bills, on this basis we have \$2,184, and the cost of the show is \$1,000.50; we have a total cost on this basis of \$3,184.50 for the three days, have we not? A. Right. 1448

Q. Now, the receipts for those three days that "Letty Lynton" was showing was \$6,593.75; is that correct? A. Correct.

Q. And if we subtract the total expenses on this basis I have outlined to you, we get \$3,409.25? A. That is approximately correct.

Q. Is the admission tax included in the receipts you have stated here, or is it separate? A. That is not included. Wherever it exists it is entirely separate.

Mr. Driscoll: That is all.

By Mr. Pollak:

Q. Mr. Mills, will you explain why you apportioned the overhead items as between the days on which "Letty Lynton" ran and the days on which it did not run on a ratio of gross receipts? A. Because the gross receipts for the week end, Saturday and Sunday, which is known as the good half of the week or the preferred playing time, is much greater than on the ordinary week days. For that reason the better class of attraction is given a preference in the showing time. Where there are two attractions 1449

Jesse T. Mills—For Defendants—Recalled—Re-direct.

1450 shown, one for the week ends and the other for the middle of the week, the better attraction is always given the preference, as "Letty Lynton" was in practically all cases, probably all, but I will say practically all cases, certainly in this case.

1451 Knowing that you do give the preference to the week end and knowing that we depend for a much greater share of our business on Saturday and Sunday than we do for other days of the week, it is a generally accepted rule in the motion picture business that the allocation of weekly expense on a day basis, by dividing the weekly expenses by 7 and charging the same amount of expense to Saturday and Sunday that is charged to other days, is not a fair allocation of expense and is never used when you are figuring the common sense allocation of profits to individual attractions for the week end and the other days of the week.

Mr. Driscoll: I move to strike out, that it is never used. I do not believe that this witness can be quite as sweeping as he has been in his testimony. He can testify to his experience. To make a statement like that and have it remain in the testimony is not reasonable. He does not know it is not used. It is used.

1452 Mr. Pollak: Are you testifying, Mr. Driscoll? I will consent to have the phrase "it is never used", stricken out.

Q. Is it a general practice, if you know, in accounting in the motion picture exhibiting industry to ascribe overhead expense on a gross receipts basis as between days of the same week?

Mr. Driscoll: I object to that unless this witness can qualify by showing that he has personally had charge of accounts and accountings for other concerns than Metro-Goldwyn.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Mr. Pollak: All right, if you want his experience. 1453

The Special Master: Isn't Mr. Mills's testimony simply to the effect that he as an accountant thinks that is a fair allocation between the days of the week? As a practical matter, I don't believe this particular situation has ever occurred before, has it?

Mr. Pollak: I think I can bring that out.

Q. Mr. Mills, are you familiar with the accounting of chains of theatres generally in the motion picture business?

A. I am. 1454

By the Special Master:

Q. Has there been any necessity for splitting up a week in those accountings? A. There has.

By Mr. Pollak:

Q. Not merely in this litigation, but generally? A. Yes, every day.

Q. Are contracts written on a profit-sharing basis between distributors and exhibitors? A. They are; it is quite the custom.

Q. Is there a custom, in estimating profits, of making a larger allocation, whether or not exactly on the gross receipts, to the week end itself? A. It is quite the custom. 1455

Q. Will you explain one practice that is used in connection with such contracts? I am referring now to divisions into tenths of a week. A. The contracts between exhibitors and distributors are very often based on tenths of a week dividing the week into tenths as distinguished from sevenths ascribing two units to Saturday, three to Sunday and one to each other day, so that a picture that shows on Saturday, Sunday and Monday would be ascribed six tenths of

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1456 the week's expenses rather than three-sevenths, being slightly over a half. Those contracts are made every day.

Q. And expenses are then allocated on that proportion as between the days of the week? A. Yes, sir.

Q. Does the testimony that you have hitherto given as to the direct expenses also apply to the direct expenses as between the days of the week? A. Yes.

Q. And contracts so written allocate direct expenses on this basis of tenths, do they not? A. Correct.

Q. And this is a familiar practice in the motion picture industry?

1457 Mr. Driscoll: I object to the form of the question.
The Special Master: He has already said that there has been such practice.

Q. Is this practice a general one in the motion picture industry?

Mr. Driscoll: Object to the form of the question.

The Special Master: They have done it in your own company?

The Witness: Yes.

Q. Has it also been done by other companies?

1458 Mr. Driscoll: I object to that unless this witness can testify that he has had experience in other companies.

Mr. Pollak: There is no such rule. All that an expert has to show is that he knows the practice.

The Special Master: I think all he has to do is to say that he has done it in his own industry.

A. I have done it for other companies.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

The Special Master: What I am trying to bring out is whether there had been other cases where this practice was used, or whether it was gotten up for this case. 1459

The Witness: I have done it with other companies.

Q. Does Loew's itself deal on this basis with other companies? A. Yes.

Q. Because these theatres have themselves contracts with other producers and distributors besides Loew's or M-G-M?

A. Right.

Q. And account on that basis? A. Yes.

Q. Mr. Mills, have you also made a calculation for the purposes of this case to determine whether, taking the aggregate of these 100 theatres as far as you could determine, a computation on the basis of tenths, allocating both direct and overhead expenses on this basis of tenths, or a computation on the basis of gross receipts, which of them would be more favorable to the plaintiffs? A. I have made an estimate. 1460

Q. What was the result of that estimate?

Mr. Driscoll: Objected to as immaterial.

The Special Master: I should think that it was objectionable more on the ground that you ought to produce the analysis. 1461

Q. Did you take a number of theatres chosen from this list and make this analysis? A. Yes.

Q. Have you got the computation itself here? A. Not here.

Q. You have them up at M-G-M? A. Yes.

Mr. Pollak: If it will shorten this thing, and it may, we had just as soon do it on a tenth basis. I

Jesse T. Mills—for Defendants—Recalled—Re-direct.

62 think it might be less complicated. Is that agreeable to you?

Mr. Driscoll: No. We contend that you have no right to do it, on either basis. We contend your insurance premiums are no different for Saturday and Sunday then they are for Thursday and Friday and that your real estate taxes are no different, and that your interest on your mortgage was no different on those days; that your depreciation was no different. They are per diem items. You divide your year into 52 weeks. You can divide your week into seven days. This tenth thing is merely a formula that has been set up to fix the rental of films, where a picture is rented out at a certain guaranteed figure and a percentage over and above the carrying charges of the theatre for the week. In order to boost the Sunday end of the week from the middle of the week they have adopted this one-tenth basis so as to carry against the picture that might be playing those three days the big end of the expense.

63 That is not a case of allocating profits or anything of the sort. It is simply a case of fixing the rental of films. Because that is the preferable part of the week, there is no question about it—but it does not change our situation.

64 The Special Master: They want to introduce evidence to prove that they have done that under the circumstances which you describe. They will argue from that that it should be done in this instance.

Mr. Driscoll: The fact is that that is done simply to fix rental on film for exhibition purposes. But they will spread it out and try to make it appear that they keep their books on this basis, that it is a well known custom in all the branches of the business. And it is not so.

Mr. Pollak: If it is not so you can produce wit-

Jesse T. Mills—for Defendants—Recalled—Re-direct.

nesses to prove it. To shorten this thing maybe we can agree on this, that while you press your general objection to any allocation of expenses either direct or overhead between the days, you have no specific objection to taking the same computation on the basis of tenths outlined by the witness instead of the mathematically more elaborate computation on the basis of the gross receipts.

Mr. Driscoll: I don't know the meaning of that stipulation. It is not clear to me.

The Special Master: Does your examination show that that will be more favorable to Mr. Driscoll?

Mr. Pollak: The examination we have made tends to show that the system Mr. Mills has adopted, a more laborious one, probably more scientific, of taking the number of days that "Letty Lynton" did appear—that that system is a shade more favorable to the plaintiff than the rough figure of dividing the week into tenths. The tenths system was itself an outgrowth of the obvious fact that gross receipts are much heavier on Saturdays and Sundays, but does not exactly represent the ratio. Therefore, Mr. Mills has been working on a ratio of gross receipts. It would not be much of a job to check it on the basis of tenths.

The Witness: No.

Mr. Driscoll: What I say is this. They would be free to load it if "Letty Lynton" happened to be played on the week end. I admit that the week end is the better part of the week for theatre purposes. More people go to the theatre on Saturday and Sunday than they do the rest of the week. My position is that this system is used only for one purpose, and that is where you as exhibitor and I as distributor reach a contract whereby I will get a percentage in addition to the guaranty for my

1465

1466

1467

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1468

picture. But you say, "I have got to have my carrying expenses; I have got to have my ordinary running expenses; then we begin to divide on any basis." For that purpose and that purpose only, to fix that rental, that 1/10th thing or 2/10ths or 3/10ths, the formula was worked out, to establish a profit from that, in the use of that formula, that you are to pay me, we arrive at a certain figure where the split begins. It is not so carried on their books; they do not use it in any other way.

The Special Master: Do they use it in partially owned theatres? -

1469

Q The Witness: The same.

Mr. Driscoll: If they are playing pictures from the outside on such a split above expenses they use such a formula; that is the only purpose of it.

The Special Master: When a theatre is 100 per cent owned they don't do it?

1470

The Witness: It doesn't make any difference whether the theatre is 100 per cent owned or partially owned, the contract made with Metro or any other distributor, it does not matter who the stockholders are, they agree to show a picture three days, Saturday, Sunday and Monday and they agree that in arriving at the rental of this picture on what this picture is carrying they shall take the gross receipts and they shall take six-tenths of the expense being the amount properly allocable to those three days, and that a certain percentage of the excess shall be used in arriving at the rental value of the picture.

By Mr. Pollak:

Q. And that is done by the wholly owned subsidiaries: yes or no? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Q. And also by the partially owned subsidiaries? A. 1471
Yes.

Q. And it is done by the companies wholly owned in their contracts with distributors other than M-G-M, is that right? A. That is right.

Q. And it is done by the theatres partially owned in their contracts with distributors other than M-G-M? A. That is right.

By Mr. Driscoll:

Q. And in this particular case here, for instance, Lexington Theatre, such a formula was not used at all, because there was no split or percentage paid above the carrying charges? A. That is right. 1472

Q. It had no effect on this situation at all. Here was a place where they rented it out at a flat rental for three days, so they didn't have any use for the formula. It had nothing to do with their carrying charges or anything else because it is a formula that has been adopted to estimate rentals.

The Special Master: Isn't that probably true, Mr. Pollak?

Mr. Pollak: I say that is probably a correct statement of fact. I say it is used where contracts are made, where there was division, a profit-sharing basis, which is the best illustration that it should be used here. 1473

Mr. Driscoll: I venture the statement, without being able to check it up, that in any release or showing of "Letty Lynton" in all these 103 theatres they have listed in Exhibit L-1 there was not one of that type of contract, there was not one on that formula—and I have not seen their contracts yet.

The Special Master: Do you wish to say something about that?

Colloquy of Counsel

1474

Mr. Pollak: It happens that most of the theatres were on a flat rental basis as to this particular picture.

The Special Master: I can't stop you from putting in testimony to support the theory that it ought to be used in every case; but I should think it was pretty persuasive that it was not used in every case.

1475

Mr. Pollak: Mr. Master, when contracts are not made on a profit-dividing basis this problem does not arise. Where there is a rental of \$250 gross or some flat figure, no question of allocation arises. The fact that it was not used in those cases has absolutely no logical significance. It means that it could not be used. The contract was not written in there.

1476

Mr. Driscoll: You forget what we are doing here under the order of the Court is taking an account of profits that were made in the showing of "Letty Lynton". What you want to do is to say, "Although it was not on a split basis or anything of the sort, we are entitled to treat it as though it was and thereby lessen our profits, simply because of the fact that such a formula has been used in the renting of films, and therefore we want to use it here to lessen the profits you fellows are going to get."

Mr. Pollak: What Mr. Driscoll has not refuted but confirmed by his own candid admissions is that, where a question of profits does arise as a matter of actual practice in the movie business, profits are computed in accordance with the principle of allocating expenses, both overhead and direct.

Mr. Driscoll: You put into my statement more than I put into it. I don't want that statement to go unchallenged.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Mr. Pollak: What Mr. Driscoll has not refuted but confirmed here is a matter of practice in the movie business where contracts are so written that the matter of profits becomes material, as on an accounting of profits it becomes material, then it is the practice to ascribe to the end of the week expenses, both direct and overhead in a ratio that corresponds to and reflects the known fact that receipts are much heavier in the latter part of the week.

1477

Mr. Driscoll: Kindly have the record show that Mr. Driscoll does not concede that to be the fact.

Mr. Pollak: As I understand, Mr. Driscoll concedes that where contracts are written on a profit-sharing basis they are written on a basis which gives two-tenths of the week to Saturday and three-tenths to Sunday and one-tenth to each of the other five days.

1478

Mr. Driscoll: I know of no such rule or custom in the business, except in the one instance and one branch of the business and that is in the renting of film where a film is being rented by a distributor to an exhibitor and there is to be a percentage split, in addition to the guaranty, over and above what it costs to run the theatre. In such a case, in order to arrive at a rental, such a formula is used. I know of no other case where it is used.

1479

Mr. Pollak: I should say it is exactly in connection with that particular problem that it does arise.

The Special Master: I think I have got it clear.

By Mr. Pollak:

Q. Is this formula of tenths to which you have made reference, is it itself an approximation of the gross receipts formula? A. It is.

Colloquy of Counsel.

80 Mr. Pollak: Do you wish to cross examine, Mr. Driscoll?

Mr. Driscoll: No, I think these exhibits speak for themselves. I do not think it is denied that insurance premiums are as expensive on Saturday and Sunday as on other days.

Mr. Pollak: Referring to Exhibit L-5, the computation of overhead of the Lexington Theatre, do you want any further evidence that these expenses were incurred, or do I understand that generally speaking you recognize these exhibits as prima facie establishing the expenditures?

81 Mr. Driscoll: I recognize these as establishing the facts prima facie, when you ask me do I want any further evidence—except I do not recognize the interest on net investment was an expense incurred; I do not believe that was paid out.

Mr. Pollak: You do not believe that it is a correct computation? That is a point of law.

Mr. Driscoll: I do not dispute that it is a correct computation. I do dispute that it was paid out.

Mr. Pollak: It was, of course, the computed interest on the investment. I think, Mr. Master, that is all we can offer at this time. We have picked out two theatres, one showing a whole week's showing of the production and the other a part week's showing.

82 (Discussion off the record.)

(Hearing adjourned until Monday, June 21, 1937, 10 A. M. The following dates were fixed for further hearings: June 28, 29, 30, 1937.)

HEARING OF JUNE 28, 1937.

1483

New York, N. Y., June 28, 1937.

10 o'clock A. M.

JESSE T. MILLS, resumed:

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, have you had prepared under your direction a statement showing the profit or loss of theatres owned by corporations wholly owned by Loew's Inc. during the periods in which "Letty Lynton" together with other attractions was exhibited? A. I have. (Papers produced.)

1484

Q. That statement is on two sheets, is it not? A. Correct.

Mr. Pollak: I offer both sheets in evidence, if your Honor please, as one exhibit.

(The papers just offered were received in evidence and marked Defendants' Exhibit No. L-6, of this date.)

Q. The heading of the sheets is substantially the statement contained in my last question? A. Yes, substantially; you said "owned", and it is "operated" here.

1485

Q. The schedule is so carefully prepared that I think it substantially speaks for itself. The pay roll and Trade Bills, being the third column, the first after the name of theatre and the name of the corporation, represents actual cash disbursements of the week; is that right? A. That is correct, under that caption.

Q. Will you explain the fourth column, Overhead for Entire Week; how was that figure arrived at? A. I have made up another schedule showing the individual items that go to make up the net overhead expense of the theatre

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1486 for the entire year, and on that schedule, which I understand it is proposed to submit, in the last column appears the 1/52nd of the total expenditure, and it is the net overhead expense applicable to each week in the year on a pro rata basis.

Q. That schedule lists the theatres in the same order, does it not, as the schedule, Exhibit L-6? A. It does.

Q. That schedule, by a good deal of grouping, you have managed to get into one sheet, have you not? A. Yes.

Mr. Pollak: You have a copy of that, Mr. Driscoll.

1487 Mr. Driscoll: Yes.

Mr. Pollak: I offer it in evidence.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. L-7, of this date.)

Q. That schedule is captioned, "Overhead Expense of Theatres Operated by Corporations Wholly Owned by Loew's Incorporated For the Fiscal Year Ended August 31, 1932?" A. That is correct.

Q. Am I right in this, Mr. Mills, that the breakdown figure at the extreme right of Exhibit L-7 is always the same figure appearing in the fourth column of Exhibit L-6 as overhead for the entire week? A. That is correct.

Q. The fourth column or the second monetary column? A. Yes.

Q. Speaking simply of monetary columns, which I think is the simpler way, and returning to Exhibit L-6, the third column shows the box office receipts of the entire period in which "Letty Lynton" together with other attractions was exhibited? A. That is correct.

Q. Is it true that in all these cases there were some attractions other than "Letty Lynton"? A. There were always some other attractions.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Q. Now; then, the fourth column in Exhibit L-6 shows the percentage of the week's receipts received during the period in which "Letty Lynton" together with other attractions was exhibited? A. That is correct.

1489

Q. The essence, I suppose, there is that in some instances "Letty Lynton" ran for a week in certain theatres? A. Yes. In that case it would be shown as 100 per cent.

Q. As an illustration, you might take the Newark Theatre operated by the New Broad Company. A. That is right.

Q. Now, then, going on to the fifth monetary column in Exhibit L-6, the pay roll and trade bills applicable to the period in which "Letty Lynton" together with other attractions was exhibited, how do you get those figures, Mr. Mills? A. By taking the total pay roll and trade bills for the entire week, the amount of the total pay roll and trade bills for the entire week and multiplying that sum by the percentage of receipts in that week received during the days on which "Letty Lynton" together with other attractions was exhibited.

1490

By Mr. Driscoll:

Q. In other words, the percentage that appears in the fourth column of figures? A. That is right.

Q. How do you synchronize the first column of figures with that? You have pay roll and trade bills. Taking the Astoria Theatre. Add up your trade bills and your pay roll; you have \$1,185.65 trade bills and \$849.50 pay roll, which together would seem to come to \$2,035.15, and in the first column you seem to have \$2,010.15. A. Because there has been income against that; the amount of miscellaneous income is deducted from the trade bills

1491

Mr. Driscoll: All right. I just wanted to get it clear in my own mind.

Jesse T. Mills—For Defendants—Recalled—Re-direct.

1492 By Mr. Pollak:

Q. Now, passing on to the sixth monetary column in Exhibit L-6, Overhead Applicable to Period in which "Letty Lynton" together with other attractions was Exhibited, are the figures there obtained by applying the percentage given in the fourth column of figures to the total overhead for the entire period, for the entire week? A. That is the way it was arrived at.

Q. Now, the next column, the seventh column of figures, simply states the actual cost of the feature "Letty Lynton" to the theatre? A. That is the amount that was paid for the feature "Letty Lynton".

1493

Q. Similarly the eighth column shows the actual cost of other attractions to the theatre? A. That is right.

By Mr. Driscoll:

Q. Take that Astoria Theatre again, the cost of other attractions, \$58, how do you get that? Do you take that percentage? A. No, it is our actual items for those three days.

The Special Master: The seventh column, as I understand it, has already been accounted for.

1494

Mr. Driscoll: That appears on the photostat in each case as the cost of "Letty Lynton".

The Special Master: But it has been reported as receipts?

Mr. Driscoll: Yes, in the other accountings.

Mr. Pollak: That is correct, sir.

By Mr. Pollak:

Q. The ninth column, Profit or Loss Applicable to Period in which "Letty Lynton" together with other attractions was Exhibited, how was that arrived at? A. That is

Jesse T. Mills—for Defendants—Recalled—Re-direct.

arrived at by taking the box office receipts appearing in the third column of figures as the income, deducting from that the total of the fifth, sixth, seventh and eighth columns, and arriving at the net profit applicable to the period in which "Letty Lynton" was shown.

1495

Q. The next column, the tenth column, simply shows Loew's percentage of interest in the profit or loss? A. That is correct.

Q. Now, in some instances, as I understand from this schedule, as to companies whose stock is wholly owned by Loew's Inc., the percentage of interest in profit or loss does not correspond to 100 per cent; is that correct? A. That is correct.

Q. Whatever the proportion of interest in profit or loss is it is recited in that column? A. That is true.

1496

Q. Now, then, the eleventh column, Amount of Loew's Inc. Profit or Loss during Period in which "Letty Lynton" together with other attractions was Exhibited, is simply arrived at by applying the percentage in the tenth column to the figure listed in the ninth column? A. That is right.

Q. And the twelfth and last column takes a two-third share of the eleventh? A. That is correct.

Q. Now, there have been offered in evidence as typical certain weekly reports of one or two particular theatres?

A. That is correct; the Lexington and the Metropolitan, to be exact.

1497

Q. In connection with those weekly reports was it not noted on the record that the amount there given as overhead differs from the amount now computed as overhead on a 52-week basis? A. That is right.

Q. That it was different? A. Yes.

Q. Am I right in this, Mr. Mills, that this schedule, Exhibit L-6, is based on the weekly reports of each of those theatres therein listed, with a recomputation of overhead? A. That is correct.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

98 Q. Now, Mr. Mills, is this correct: that a copy of the weekly statement of each of the theatres included in Exhibit L-6 has been given to Mr. Driscoll? A. That is correct.

99 Mr. Pollak: I should explain in that connection that the very exhaustive examination for two weeks that was made by Mr. Mills and his associates into this matter has revealed that Exhibit L-1, which listed theatres—your Honor recalls that—should be itself further subdivided and superseded in this respect, that the classification should be more precise. Some of the theatres, namely, the ones that Mr. Driscoll has mentioned—do you mind giving the names?

Mr. Driscoll: Loew's Broadway, Freeman, Mount Vernon, Plaza, Prospect, Sheridan and Willard, the last seven appearing on the second sheet.

Mr. Pollak: —owned by the Marcus Loew Booking Agency, were as a matter of fact operated by the Marcus Loew Booking Agency, and we are preparing a new schedule showing all the classes of relationship borne by these companies.

00 I think there was also omitted from Exhibit L-1, as was found by careful checking, a case of one theatre in Westchester County where there was an ownership of ten per cent. of the stock by Loew's Inc. But that schedule with those changes will be done over.

Q. Now, returning to Exhibits L-6 and L-7, I think I can have a yes or no answer to this question. As to these theatres operated by corporations wholly owned by Loew's Inc., am I right in this, that the weekly statements for the period in question as to each of these

Jesse T. Mills—for Defendants—Recalled—Re-direct.

theatres has been given to Mr. Driscoll? A. That is correct. 1501

Q. Now, returning to Exhibit L-7, in some cases I find that there was no rent. Will you explain how it came about, Mr. Mills? A. Because the theatre was owned in fee; the entire property was owned in fee and, therefore, no rent was payable to landlords.

Q. Where an item of rent appears it means in all cases the rent that was charged against the company for the year by the landlord? A. And was paid to the landlord.

Mr. Driscoll: What column was that?

The Witness: In the first column.

Mr. Pollak: The first column of figures on Exhibit L-7. 1502

Q. Now, the second column, the figure Insurance Premiums explains itself. It is the insurance premiums actually paid? A. It is the insurance premiums actually accrued, whether actually paid then or not.

Q. The same is true of real estate taxes and licenses; it represents the accrued obligation? A. That represents the amount paid.

Q. Actually paid whether accrued or not? A. Yes.

Q. Accrued interest payable, what does that interest represent? A. That speaks for itself; that is the accrued amount. 1503

Q. You mean, in cases where there were mortgages or other outstanding indebtedness? A. Yes.

Q. What does the item Investment Interest represent? A. Investment Interest represents six per cent. interest on the net equity of the corporation in the residual value of the fixed assets after allowing for any mortgages outstanding, and appears on the books.

Q. Those figures in all instances were derived from the books? A. They were.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1504 Q. By those figures I mean the figures under the caption Investment Interest? A. Yes.

Q. As to the column headed Depreciation and Amortization, how did you arrive at the figures and what do they represent? A. They represent in the main three per cent. depreciation on buildings, ten per cent. depreciation on equipment, and amortization in a very few instances of any leasehold interest, which may have been actually paid out and spread over the life of the lease.

Q. How did you compute that amortization? A. Based on the life of the lease.

Q. On the theory of its being a depreciating asset? A. That is correct.

1505 Q. You made those computations separately as to every one of the theatres involved in L-6? A. That is correct.

Q. What does the item Sundry Expense represent, in a general way? A. In a general way it represents comparatively small items of one and two hundred dollars of incidental expenses of the corporation which were not included in the weekly statement as a weekly expense, but was more in the nature of an annual—license fees or other expenses of various natures; and where the amounts are larger than that they represent in some cases the operation of buildings where there is quite a large number of tenants and require a certain amount of building expenses in the way of janitor services and cleaning and electric light in the building, and so forth. It also represents any franchise taxes paid by the corporation in the year. I think that covers the main items of the expenses included in that column.

1506 Q. Rent Income, I take it, represents actual receipts from parts of the building not used for theatrical purposes? A. Actual receipts or good accounts represented at the end of the year; if they had not actually been received at the end of the year they were carried as income and collected the following year.

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Q. Your items of Other Income, what kind of income did that represent? A. Other income would be what is known as candy privilege where we have a candy stand in the lobby, as distinguished from rent; water and light collected from tenants; where we have expense the corresponding item collected from tenants will be in the income column. In case there were any deposits on leases bearing interest on security, the interest received from that deposit will be credited in there as miscellaneous receipts. 1507

Q. The column headed Total for Year, next to the last column on the sheet, that is a mere addition of all of the items of overhead expense, less items of income? A. That is correct. 1508

Q. And, of course, the Per Week $1/52$ divides Φ on that basis? A. That is correct.

Q. In the few instances stars appear in the column, the last column on the right? A. That is right.

Q. For instance, Atlanta, there is a note which says "41 weeks", and in the case of Wilmington Theatre it appears as "35 weeks". A. That is correct.

Q. What does that mean, Mr. Mills? A. That means that the overhead expenses listed here are not for a full year, but are only for 41 weeks—the theatres in the case of Atlanta the theatre was closed for eleven weeks of the year during some extensive alterations and the corresponding overhead items were capitalized in the cost for those weeks and not included in the overhead expense here. There was, therefore, total expense of only 41 weeks as distinguished from 52 weeks. 1509

Q. In the Wilmington case it was the same idea? A. In the Wilmington case it was the same idea; it was not open the full year and the overhead expenses do not cover the full year.

Mr. Pollak: Mr. Driscoll, will you accept the schedules, Exhibits L-6 and L-7, together with the

MICRO CARD

22

TRADE

MARK



39



1412

65



Jesse T. Mills—for Defendants—Recalled.—Re-direct.

1510

weekly statements for the theatres therein represented, as prima facie showing, subject to cross examination by you, the income of the several theatres operated by companies wholly owned by the defendant Loew's Inc.?

Mr. Driscoll: Prima facie of what they are supposed to be.

Mr. Pollak: I think in the interest of clarity I will have Mr. Mills explain one thing. It appears on Exhibit L-6. There has been some allusion to it. If your Honor will turn to the third column from the right in L-6, I have already mentioned that in some instances as to wholly owned theatres the interest in profits or loss was less than 100 per cent., being 50 per cent. in the case of one theatre here.

1511

By Mr. Pollak:

Q. Will you explain that in a general way, Mr. Mills?

A. That is because the percentage of Loew's Inc. ultimate interest in these theatres is less than 100 per cent. represented by the stock ownership in that particular company, because that particular company has a sharing or pooling arrangement with the landlord or other operators of the theatre. An example of the first exception to that 100 per cent is the 42nd Street Theatre, where the percentage is shown, 50 per cent. There, 50 per cent. of the profits of that corporation are paid to the landlord as additional rent for the theatre.

1512

Q. Is the same in principle true for all the other cases on L-6 where the percentage of profits is less than 100 per cent.? A. That is correct.

Q. Now, Mr. Mills, have you prepared a schedule showing the profit or loss of theatres operated by corporations partly owned by Loew's Inc., during periods in which "Letty Lynton" together with other attractions were exhibited? A. I have. (Papers produced.)

Jesse T. Mills—for Defendants—Recalled—Re-direct.

Q. That represents, does it not, the case of theatres where the ownership, though partial, is direct, the ownership of stock in the operating company? A. That is correct. 1513

Mr. Pollak: I offer this schedule in evidence: Profit or Loss of Theatres Operated by Corporations Partly Owned by Loew's Incorporated During Periods in which "Letty Lynton" Together with Other Attractions was Exhibited.

The Special Master: Received.

(The paper just offered was received in evidence and marked Defendants' Exhibit L-8, of this date.) 1514

Q. Have you similarly prepared a schedule showing the overhead expense on these theatres operated by corporations partly owned by Loew's Inc. for the fiscal year ended August 31, 1932? A. I have. (Papers produced.)

Mr. Pollak: I offer this schedule in evidence.

(The schedule just offered was received in evidence and marked Defendants' Exhibit L-9, of this date.)

Q. And of course, the corporations appearing in Exhibits L-8 and L-9 are the same in the two exhibits? A. They are. 1515

Q. And in the same order? A. They are.

Q. Am I right in this, that as to the corporations appearing in Exhibits L-8 and L-9, weekly statements have in all instances been given to Mr. Driscoll? A. They have.

Q. Is this correct, my understanding of it—I think it can be answered yes or no—is the principle on which these schedules L-8 and L-9 have been prepared exactly the same as the principle on which Exhibits L-6 and L-7 have been prepared, with the sole difference that as to these partially owned theatres they are computed at the proportion of

Jesse T. Mills—for Defendants—Recalled—Re-direct.

1516

profit or loss represented by the Loew interest, which in each case is less than 100 per cent.? Is there any other difference in principle between the two sets of schedules?

A. There is no difference in principle as to them. They are both exactly the same in principle.

Q. In the case of the latter, Loew's interest in the profit or loss for the period during which "Letty Lynton" was exhibited would be 100 per cent. in most cases? A. That is true.

Q. It would not be in the exceptional cases you mentioned where special contracts give Loew's less than 100 per cent. interest? A. Both groups have been handled the same way.

1517

Mr. Pollak: I ask Mr. Driscoll whether he will accept Exhibits L-8 and L-9, subject to his cross examination, as proving prima facie the facts therein set forth in those two exhibits.

Mr. Driscoll: As they set them forth, yes.

By the Special Master:

Q. What is the theory under which this last column is made up, showing two-thirds share of profit or loss?

1518

Mr. Pollak: That is in accordance with the contention of ours at the last hearing, if your Honor please, that in view of the fact that "Letty Lynton" took up less than two-thirds of playing time of the theatre and in view of the fact that in all cases there were expenses for other attractions than "Letty Lynton", a minimum allowance of profit or loss to those other attractions, vaudeville or shorts, news, and so forth, would be on an average one-third. I think you recall that.

The Special Master: Was that in the previous testimony? I don't recall that.

Colloquy of Counsel.

Mr. Pollak: It is a point of law. Mr. Driscoll 1519
stipulated that we could call a witness who would
testify that the attraction of the theatre included
many other things—

The Special Master: Was there any other testi-
mony of the one-third and two-thirds? O

Mr. Pollak: At present there is no direct evi-
dence of that particular contention. You asked me
if I would be willing to stipulate that that would
be our contention rather than introduce in every
instance evidence on a fraction basis.

The Special Master: What did Mr. Driscoll say?

Mr. Pollak: Mr. Driscoll, if I am correct, thought 1520
I could produce a witness who would testify that
the other attractions did have drawing power. He
was not willing to stipulate that we could produce
a witness who would testify that the other attrac-
tions account for one-third.

The Special Master: I remember it now.

Mr. Pollak: I think you will find in that connec-
tion that the tabulation of the cost of the other at-
tractions is instructive. I think it shows that on
an average the cost of the other attractions was
slightly more than one-third of the total cost of
other attractions and of "Letty Lynton" combined.
I think the ratio is something like 36.64 per cent. 1521
Of course, it varies enormously at different theatres.

The Special Master: I understand.

Mr. Pollak: And also you understand that the
ratio of the playing time of the other attractions is
definitely more than one-third. It is either stipu-
lated or testified without contradiction that the
playing time of "Letty Lynton" was 84 minutes, and
the total playing time of a movie house is ordinarily
two and a half hours.

The Special Master: I don't remember that.

Jesse T. Mills—for Defendants—Recalled—Re-cross.

1522

Mr. Driscoll: They did, I think, but Mr. Mills testified that the ordinary playing time of "Letty Lynton" was 82 minutes, as I recall it.

Mr. Pollak: 84.

Mr. Driscoll: I am wrong.

The Special Master: Mr. Driscoll, if their theory on this accounting is correct do you make any point on the question of proper allocation of two-thirds of profit or loss to "Letty Lynton"?

1523

Mr. Driscoll: My contention goes beyond the relation of the playing time of "Letty Lynton" to the rest of the attractions. We contend as a matter of law the profits made that week cannot be divided or allocated in any manner.

The Special Master: I understand that. But assuming that their contention was correct, do you make any point of the division?

Mr. Driscoll: No.

The Special Master: That is all I wanted here.

Mr. Pollak: You may cross-examine Mr. Driscoll.

Cross examination by Mr. Driscoll:

1524

Q. Mr. Mills, on Exhibit L-6, the first theatre that appears on there is the Astoria, and there "Letty Lynton" played two days, is that correct? A. Two days is correct.

Q. Now, those days were May 30th and May 31st? A. Right.

Q. And the receipts for those two days are set forth in detail in the photostatic copy of the box office statement which you have? A. That is right.

Q. Will you kindly produce that photostatic copy? A. I have it (producing paper).

Mr. Driscoll: I offer it in evidence.

Mr. Pollak: No objection.

Jesse T. Mills—for Defendants—Recalled—Re-cross.

(The photostat just offered was received in evidence and marked Plaintiff's Exhibit B, of this date.) 1525

Q. Will you kindly produce the box office statements for all of the theatres on Exhibit L-6? A. These are all of the statements, weekly statements, listed on L-6 with the exception of the Metropolitan and the Lexington which are already in evidence.

(Papers produced by the witness.)

Q. And the Astoria? A. The Astoria I just presented to you.

Q. Then I assume you have in this bundle of box office statements that you have now produced here 45 different statements? A. There are slightly more statements—by statements we mean sheets of paper—than the number of theatres, due to the fact that in a few instances the picture was shown in two different weeks, the days ran from one week to the other, and in that case you will find two statements covering the operations for the period during which "Letty Lynton" was played at that theatre. 1526

Mr. Pollak: Just one moment, Mr. Driscoll. As a mechanical matter, how should these be marked; as one exhibit?

Mr. Driscoll: I care not. I would suggest that we mark them as one exhibit. 1527

Mr. Pollak: Make these the same exhibit as the previous exhibit for the Astoria Theatre.

(The statements just offered were received in evidence and marked respectively Plaintiffs' Exhibit B-1 to Plaintiffs' Exhibit B-45, inclusive, of this date.)

Q. This overhead that appears on Exhibit L-6 is not based upon the number of days; it does not take as a basis

~~Jesse T. Mills for Defendants—Recalled—Re-cross.~~

1528 the number of days that "Letty Lynton" played, for instance, at the Loew's Astoria, but takes as a basis the week that it played there? A. That is correct, the entire week.

Q. And when you figured the box office receipts you took the box office receipts only for the days that "Letty Lynton" played at that theatre? A. That is correct.

Q. And then in the next column of figures, the fourth column, you figure the percentage of box office receipts during the days that "Letty Lynton" was playing at the theatre, to the total box office receipts for the week? A. That is right.

1529 Q. And you figured the payroll and trade bills in the same manner; you took the percentage represented by the number of days that "Letty Lynton" was playing at the theatre, which in turn based upon the box office receipts for "Letty Lynton" during the days it played there compared with the week's receipts? A. That is correct.

Q. Now, it is a fact, is it not, Mr. Mills, that you have the same crew in the theatre on Sunday and Saturday, the same number of people that you do on Wednesday, Thursday and Friday? A. No, it is not true.

Q. What differences are there? A. The full crew is there on Saturday and Sunday certainly, and any time off is given off on the other days of the week.

1530 Q. Are those hired on a weekly basis? A. They are hired on a week's basis, with one day's time off.

Q. In other words, all of your crew are hired on the basis of a week of six days? A. That is true.

Q. Now, is there any more tax paid for Saturday and Sunday than for Thursday and Friday? A. Ordinarily not.

Mr. Pollak: You don't need any evidence on that subject.

Mr. Driscoll: Mr. Pollak states on the record that we don't need any evidence on that subject.

Mr. Pollak: I so concede.

Jesse T. Mills—for Defendants—Recalled—Re-cross.

Q. Now, then, you carry over the figure that appears in 1531 the second column of figures on Exhibit L-6 into the last column on Exhibit L-7; that is, \$1,781.71 for the Astoria Theatre, for instance? A. Yes:

Q. You carry that over into Exhibit L-7?

o Mr. Pollak: Pardon me. In order to be accurate, it is brought over from Exhibit L-7 into L-6.

Q. Excuse me. Mr. Pollak is right as usual. You arrive at your week's overhead of \$1,781.71 from the computation you make in Exhibit L-7, and carry it over into Exhibit L-6? A. That is correct.

Q. Now, then, turning to Exhibit L-7, in the case of the 1532 Astoria Theatre, for instance, you have accrued interest payable \$11,687.50. Will you kindly give us the details of that? A. That is the actual interest accrued in the fiscal year ending August 31, 1932, on the mortgage and any other indebtedness in connection with the Astoria Theatre.

Q. The Astoria Theatre is owned by the Astoria Theatre Corporation? A. That is correct.

Q. Which in turn is owned by Loew's Inc.? A. That is right.

Q. Now, what interest was paid; what are the details of that interest item of \$26,108.00? A. The investment 1533 interest.

Q. What were the investments? A. The investments were the investments of the corporation in the equity in the land, building and equipment of the theatre after reserve to date for depreciation, less mortgages against the property the interest of which had been included in the previous column.

Q. Can you give us a breakdown of that investment interest? A. I can't get it now. I haven't it here.

Jesse P. Mills—for Defendants—Recalled—Re-cross.

1534 By the Special Master:

Q. You passed that Accrued Interest Payable; you say that is an actual payment of interest on mortgages? A. That is true, or any other interest-bearing indebtedness.

Q. All those mortgages were held outside of Loew's? A. They were.

Q. And it was not paid to Loew's? A. That is correct.

By Mr. Driscoll:

1535 Q. Now, Mr. Mills, I would like very much to have you produce here at the next hearing a few of these so that we might see what they are. Take the case of the Astoria Theatre. I think we ought to have certain further information, a breakdown of that accrued interest, what it is payable on, giving us the amount, and if on mortgages when the mortgages were made. Bring in the mortgages if you want.

Mr. Cohen: We wouldn't have those.

Mr. Driscoll: I would like full details of how, when and where that \$11,687.50 was payable; I want to know when that mortgage was placed, to whom it is payable, and so forth.

1536 By the Special Master:

Q. Can you tell me the theory of that column? A. Assuming that the land, building and equipment of the theatre cost originally \$1,000,000. Assume that we have depreciated to date \$300,000. The net value of that property is now \$700,000 on our books. Assume for the sake of argument that we have a \$200,000 mortgage on the property. Subtract the \$200,000 mortgage from the \$700,000, and we have \$500,000 net equity in the property, which the corporation has put in of its own funds.

Jesse T. Mills—for Defendants—Recalled—Recross.

Q. And you allow them six per cent on that? A. That is right. 1537

The Special Master: That is what I thought it was. I wanted to be sure.

By Mr. Driscoll:

Q. Mr. Mills, I don't want to make this burdensome to you, but I would like it if you had three or four theatres here on this Exhibit L-7, for instance, that you will bring to us the details of these various items that you have set forth here, in order that we may examine those as a sort of test for the rest of these properties. A. You are speaking now of the other columns? 1538

Q. Take the entire thing right across. Take the Astoria Theatre; take the 86th Street Theatre; take the 116th Street Theatre; take the Kings Theatre in Brooklyn. A. There are four.

Q. Now, then, turning to Exhibit B, which is the box office statement of Loew's Astoria, you have, after you have taken from the receipts the expenses of the week, a balance of \$3,583.56 before you take off overhead? A. That is right.

Q. That was checked out by the manager of the theatre by check No. 2861? A. Right. 1539

Q. To whom was that check made? A. To the Astoria Theatre Corporation.

Q. Let us understand how that is worked: Does the Manager maintain an account in his own name in which the daily receipts are deposited? A. No. The account is maintained in the name of the corporation under the special title of Loew's Astoria Theatre account, at a bank near the theatre, wherein the manager deposits the daily receipts either that night or the following day. He then draws checks as noted on this statement in various num-

Jesse T. Mills—for Defendants—Recalled—By the Referee.

1540 bers, paying the expenses, and draws a check for the balance as you have just indicated of \$3,583.56 to the corporation operating that theatre, which in this case is the Astoria Theatre Corporation.

Q. And that check No. 2861 he sends to the home office of Loew's Incorporated? A. He sends to the home office of the Astoria Theatre Corporation.

Q. Where is the home office of the Astoria Theatre Corporation? A. 1540 Broadway.

Q. Where is the home office of Loew's Incorporated? A. 1540 Broadway.

Q. Is it in the same suite of offices? A. It is.

1541 Q. So that he does as a matter of fact send in his check to the home office? A. Sends it to the home office.

Mr. Driscoll: Will you kindly produce at the next hearing—take the Astoria Theatre—these checks that are mentioned in the box office statement, checks Nos. 2859, 2860 and 2861?

By the Special Master:

1542 Q. May I ask a question? I want to get your theory as to why you put in this investment interest as a part of the overhead? from an accounting standpoint. If I understand it correctly, it is really earnings. A. May I put it this way? We have two theatres. Assume they both have the same drawing power and they are comparable in size and capacity and located on opposite sides of the street or in different localities. They both are worth \$1,000,000. They both have been depreciated \$300,000 and now stand on our books at \$700,000. On one we have a mortgage of \$200,000, and we have \$500,000 of our own money in it. On the other side of the street we might have a mortgage of \$500,000 or we might have no mortgage.

It certainly is not fair to compare the operations of one theatre with another where in one case they have no mort-

Jesse T. Mills—for Defendants—Recalled—By the Referee.

gage and in the other case a large mortgage. Somebody 1543
has put the money into that theatre, into those fixed assets.
Somebody is paying for it. We consider it the best of ac-
counting practice to equalize those charges by charging to
the operations of that theatre interest on this investment
which the corporation has made in the theatre. Where we
have another theatre of relatively the same size and class
as that, which we do not own but pay on, everyone knows
that in that rental payment that we are making to the
landlord we are reimbursing him with six per cent, five per
cent or seven per cent, whatever the rate may be, on his
money that he has invested in it, apart from any profit he
may make on that.

We think it is only fair that the investment in the prop- 1544
erties, which is very large, should be charged as an expense
in arriving at the operating profit on that theatre. Other-
wise, if you had half a million dollars invested in a
theatre and charged no interest on it and you made \$10,000
in the year on the theatre, you might think that was a
profitable business, whereas as matter of fact we know we
are losing considerable money.

We might find that the six per cent which we have fixed
here as the rate is not high enough. In 1932 we were pay-
ing, Loew's Incorporated, the parent company, which sup-
plied the money, was paying six per cent on a bond issue.
There were other expenses which raised the effective rate 1545
and discount of that bond issue to six and a half per cent,
and we were paying six and a half per cent dividend on the
preferred stock, which money was poured into loans to
these companies which owned the properties.

Q. In any isolated statement of affairs of any one of
these companies, that investment interest would appear
as net income, wouldn't it? A. It would appear as net
income if they did not pay interest to Loew's Incorporated,
the immediate parent, or other intercompany loan, or
if they had a very large capital stock so that they did not
require a loan. If it had a \$500,000 capital stock, we con-

Jesse T. Mills for Defendants—Recalled—Re-cross.

1546 sider that the interest on that \$500,000 is a proper charge to theatre operations before we begin to make money on the theatre.

By Mr. Driscoll:

Q. Your investment is represented by stock, isn't it? A. Ordinarily the investment in the common stock is comparatively nominal, and the balance is made up of inter-company loans.

By the Special Master:

1547 Q. As a matter of fact and as a practical matter, take the Astoria Theatre, what does that balance sheet show?

A. As I remember that company, it has a comparatively small capital stock, say, \$10,000, and the balance of the money is loaned by Loew's Incorporated.

By Mr. Driscoll:

Q. The loan appears in the other column, accrued interest payable? A. The accrued interest is on mortgage and other interest bearing indebtedness due outsiders, and not to Loew's Incorporated. That corresponds in my hypothetical case to my \$200,000 mortgage in my illustration here; that was a purely hypothetical case. My investment 1548 in the hypothetical case corresponds to the \$500,000 equity which the corporation has put into the property in loans from Loew's Incorporated.

By the Special Master:

Q. Of course, I understand your theory, but a great deal would depend on how these various companies were set up individually, wouldn't it—I mean, if the interest of Loew's Incorporated was entirely stock of the company?

Jesse T. Mills—for Defendants—Recalled—Re-cross

A. We would still be entitled to this return on the investment, from an operating standpoint. Somebody has got to pay for the use of this money. 1549

Q. I was just thinking that if you could assume that all of the Loew's investment in these companies was represented by stock, I should think that the investment interest would appear in the statements of those companies as net income applicable to dividends. A. Yes, but isn't it the financial income as distinguished from an operating income.

Q. If you disregard the corporate set-up.

Mr. Pollak: Only on the condition of disregarding the corporate set-up can the defendant Loew's be held liable. 1550

The Special Master: There is something in that, of course.

By Mr. Driscoll:

Q. Will you produce, also, Mr. Mills, the statement of Loew's Inc. for the fiscal year ended August 31, 1932? A. When you say "Loew's Incorporated", do you refer to it as a separate corporation, and not the consolidated report that is public?

Q. I don't know. I don't know what type of report you get out. I want to know how you show these various loans on which Loew's Inc. received interest from these various subsidiary corporations. I want to see how you carry them on the statement of Loew's Inc. A. I want to make one correction. I did not testify that Loew's Inc. received this investment interest. I said this was a proper charge on the books of the corporation to its operation. 1551

Q. Is it a fact that Loew's does not receive this item of interest of \$831,720 appearing in the column headed Investment Interest? A. That exact amount they certainly do not receive.

Jesse T. Mills—for Defendants—Recalled—Re-cross.

1552 Q. It is a bookkeeping proposition? A. No, I think it is
a proper financial proposition.

The Special Master: It certainly is a bookkeeping proposition. It may be proper. That is what is puzzling me a little bit.

The Witness: Will this statement clear it? Isn't it a fact that if the Astoria Theatre Corporation—even forgetting Loew's Incorporated, their relations to Loew's Incorporated—if the Astoria Theatre Corporation made no charge for this investment interest and, therefore, their \$92,000 total expense which now includes that \$26,000 investment interest, their expense would then be \$66,000—subtracting the \$26,000 from the \$92,000—therefore, you would have \$66,000 expense, which would reduce the overhead per year by \$26,000, which is approximately \$500 a week. If that theatre, with only a \$1200 a week overhead instead of \$1700, had made \$10 in that week, we feel that that would not be a fair statement of the facts to say that in the period that "Letty Lynton" was shown, that entire week we will say for the sake of argument, that there was \$10 profit in that week. We still say that somebody had to pay that \$500, and there was actually a loss in that week of \$490.

1554 My Mr. Driscoll:

Q. But it is a fact that the actual expense for that year was \$66,000? A. It is a fact that the expenses paid out in connection with that theatre and the proper allowance for depreciation on the fixed assets was \$66,000, plus any amount properly allocable as return on the capital invested in that theatre. In a great many instances these companies did pay to Loew's Inc. interest, sometimes approximating these amounts, sometimes more and sometimes less. Therefore, I say, the exact amount that you have quoted as the

Jerre T. Mills—for Defendants—Recalled—Re-cross.

total of that column, \$831,000, that exact amount would not appear on Loew's Inc. statement as the amount of interest. 1555

Q. By the same token you could have used 10 per cent as a fair return on the investment? A. We considered that six per cent was a fair return. It was under the actual cost of money in that year.

Q. So it sums up to the proposition of your allowing yourself six per cent on the earnings of that theatre? A. The exact cost of the expenses before earnings could be arrived at.

Q. As actual cost. You use the term actual cost. That does not mean money that you have paid out? A. As pointed out, if you are going to break down the corporate structure, it was money actually paid out, because Loew's Inc. paid it out on their \$15,000,000 bond issue and their corporate stock. This is not something we imagine to arrive at the true expense of the organization. 1556

Q. Assuming that this was fully paid-up stock and that Loew's ownership consisted of 100 per cent. of the stock. In that instance it would be earnings and nothing else. A. No, that is not true. You still have to pay your bondholders and your preferred stockholders; you have to find the money to pay them.

Q. Is the Astoria Theatre Corporation on those bonds? A. They were not. 1557

The Special Master: Is it practical to say that your position is, Mr. Pollak, that inasmuch as you are breaking down the corporate structure here you have got to take a matter of this sort into consideration as an expense rather than as earnings applicable to the stock interest?

Mr. Pollak: That is one aspect of our interest, sir. Also we make this contention: that supposing there were no question of breaking down the corporate structure, suppose even there were no cor-

Jesse T. Mills—for Defendants—Recalled—Re-cross.

1558

porations; as I understand the law, in determining what profits are earned there is always deducted from gross receipts an item representing the fair return on an investment, six per cent. in fact, because you could get six per cent. without going into business at all, and profits only begin, as I understand the theory of accounting, in patent and copyright cases profits only begin over and above the normal interest return on investment.

1559

The Special Master: I am not necessarily sure of that, but if you did not break down the corporate structure and disregard the corporate entity, and if this investment that Loew's had in these various theatres was entirely represented by stock, then wouldn't normal accounting practices carry this item of investment interest into net income?

The Witness: Into net corporate income; it would of necessity mechanically; but we make this still an operating expense in corporate income.

1560

Mr. Pollak: As Mr. Beatty suggests, suppose I take and operate a theatre; suppose I therefore had no rent to pay and suppose in fact I paid no interest to anybody because it was all my theatre and I put all the money into it; I would not be earning any profits until I had gotten back my normal six per cent. return on the million dollars that I had put into that theatre.

The Special Master: That is a different proposition, though.

Mr. Driscoll: You would be earning the six per cent. on the million dollars. And where Mr. Pollak is astray on the decisions is this: the decisions do not hold that a person who infringes upon a patent is entitled to charge against the owner of that patent a percentage of the investment in his entire business. For instance, if the United States Steel Corporation were to infringe upon a patent—

Jesse T. Mills—for Defendants—Recalled—Re-cross.

The Special Master: I understand that; that is another question. What I am trying to get clear, and I think you have got it fairly clear now by looking at your statements, that as a practical matter this item of \$831,000 represented by investment interest is six per cent. on the amount of property after depreciation held by these companies, and after mortgages, which Mr. Mills says is a proper charge at six per cent. as an operating expense, and he does not contend or claim that that amount was actually paid to Loew's in the form of interest payments.

Mr. Driscoll: That seems to be his statement.

By the Special Master:

Q. Is that right? A. That is right, although some amounts were paid. By my theory it does not matter whether they were paid or not.

By Mr. Driscoll:

Q. Now, you have stated on direct examination that you showed in certain instances here a proportionate amortization of leases over and above the amount of yearly rental; in other words, that you have taken the charges, possibly of purchasing that outstanding lease, and amortized it over the remaining term of the lease? Is that right? A. Yes, in a very few instances of leasehold. I think I should state in explaining amortization that that includes mortgages, bond discount and expense where such conditions exist on the particular theatres; I want to add that.

Q. That is in addition to the other charges that might have been incurred? A. In the word "amortization" there is more than the bond discount—actual expense spread out over the entire life of the bond issue or leasehold.

Q. I assume that some of those leases were secured in exchange for capital stock of Loew's Inc. That is not

Jesse T. Mills—for Defendants—Recalled—Re-cross.

1564 justified. If there were any leaseholds paid for, they were paid in cash or its equivalent.

Q. That applies in every instance? A. That is correct.

Q. No stock issued in exchange? A. No.

Q. Take the Loew's Boulevard Corporation that you have here; you have a rental item of \$30,166.66? A. Yes.

Q. By whom was that property owned? A. That was owned by a landlord entirely independent of Loew's Inc.—I don't remember the exact name—entirely outside of the organization.

Q. In that case you have a depreciation and amortization item, \$5,487. A. That would be on equipment placed in that theatre; that would be on \$54,000 of equipment, depreciation on that item.

1565

Q. Will you bring in the breakdown on that item? A. Yes.

By Mr. Driscoll:

Q. I notice, Mr. Mills, that in each one of these instances there is an item on the box office statement of a booking fee. Take, for instance, Loew's Astoria.

Mr. Pollak: You are referring now to Plaintiffs' Exhibit B, is that right?

1566

Mr. Driscoll: Yes, this is B.

Q. Referring to Plaintiffs' Exhibit B, which purports to be a photostatic copy of the manager's statement for Loew's Astoria Theatre, City of Astoria, for the week ending June 3, 1932, there is a booking office fee of \$200; and I find that in each one of these—B-1, which is the Century Theatre, \$100,—down through, I think without exception—maybe there are exceptions; the next one is Loew's Avenue B Theatre, \$125, and so forth. Will you kindly tell us what that booking office fee is? A. That is a charge made by the Marcus Loew Booking Agency for the overhead

Jesse T. Mills—for Defendants—Recalled—Re-cross.

expense of the main office at 1540 Broadway, of which we have allocated to each theatre an amount which, while it does not cover the entire office expense in connection with that theatre and the corporation which operates the theatre, was as fair a measure as we could arrive at to allocate the general office expenses caused by these particular theatres.

1567

Q. So you allocated to Loew's Astoria Theatre a charge of \$200 a week for the benefit of Loew's Booking Office?

A. As a partial reimbursement of their office expense.

Q. You do allocate it? Can't you answer, yes or no?

A. I can't say for the benefit of Loew's Booking office because the Booking Office still loses money.

Q. Can you say that you allocate it to the Loew's Booking Office? A. Yes.

1568

Q. In the same way you allocate to the Century \$100? A. Right.

Q. How do you arrive at \$200 for Loew's Astoria and \$100 for the Century? A. Based to some degree on the box office of the theatre and to some degree on the net profit realized by the theatre. These various amounts as fixed were not charged for any particular week, any individual week to the exclusion of other weeks, but were a uniform charge and in the judgment of the various operating heads and officials of the companies was the fair charge to that theatre, considering the various conditions and the work involved in connection with the theatre; some theatres having the same income or the same profit might entail much more work than another theatre. These amounts were arrived at in the previous September as being the proper amounts to charge these various theatres and in some cases were the subject of agreement with the cooperative interests where the stock of the company operating the theatre was not fully owned.

1569

Q. There wasn't any agreement in the case of these 100 per cent. owned theatres, was there? A. There would

Jesse T. Mills—for Defendants—Recalled—Re-cross.

be agreements in the case of theatres operated by 100 per cent. owned companies where the landlord shares in a certain percentage of the results of the theatre operations as additional rent.

Q. You say one of the elements in fixing this charge was the amount of money the theatre made? A. That is one of the elements, yes.

Q. So that the more profitable the theatre, the more of a charge they paid? A. That is right; that is one of the elements by which we fixed the amount.

Q. That is what I expected you to say. In two cases you got this charge up as high as \$450? A. Yes.

Q. What is the smallest charge you make against any of these theatres? A. I am not sure whether there was any theatre in this group under \$100; I believe that \$100 was the minimum.

The Special Master: Have you the answers to those questions, Mr. Mills?

The Witness: I have on London. These are approximate figures because he took them down in round figures.

Mr. Pollak: Go ahead and give them.

The Witness: \$3,000 for provincial and dominion taxes; \$3,000 for directors' fees and expenses; \$3,000 for repairs and renewals; \$1,500 for the secretary's salary expense; \$400 for the auditor's fees, for the certified public accountants; \$1,300 for license fees; \$500 for transfer agent, the corporation having preferred stock outstanding. That makes a total of approximately \$12,700 of these items as against the \$12,900, the exact figures. If you would like the exact figures on the breakdown of this I can supply them at the next hearing.

I might say that in each of these companies there is preferred stock outstanding in the Canadian com-

Jesse T. Miller—for Defendants—Recalled—Re-cross.

pany and our interest is in the common stock, and 1573
in 1932 the operations of the company were carried
on almost exclusively by the Canadian stockholders.

By Mr. Pollak:

Q. And the preferred stock was not held by Loew's?
A. There were a very few shares of Toronto stock held by
Loew's.

Q. In the common stock of London? A. In the London
common stock.

By Mr. Driscoll:

Q. Do you recall what the dividend on that preferred
stock was, what rate was paid? A. On the preferred stock
of the Toronto company? 1574

Q. We are talking about the London Company. A. The
London preferred stock rate is seven per cent. They were
in arrears, however.

Q. Was it cumulative? A. Cumulative.

Q. What is the rate, if you remember, on Marcus Loew's
Theatres Limited? A. Seven per cent., I think.

Q. What is the rate on Marcus Loew's Ohio Theatres,
Inc.? A. My recollection tells me eight per cent. The
original schedule carries that. I am quite sure that the
rate on Loew's Ohio preferred stock was eight per cent. 1575

Q. There are two other issues of preferred stock that
you have set forth in Exhibit L-1, one is Penn-Federal
Corporation, \$930,000. Do you remember the rate on that?
A. Either six or seven; I am not positive.

Q. And the State Theatre Company? A. Eight per cent.,
positively.

By Mr. Pollak:

Q. That is the State Theatre Company of Boston? A.
Yes, the State Theatre Company of Boston.

Jesse T. Mills—for Defendants—Recalled—Re-cross.

Mr. Driscoll: That is all.

Q. Have you given the data for Toronto? A. Yes, I just gave it.

Mr. Pollak: Mr. Driscoll, do you recall that the data that have just been given in the London Canada Theatre were declared by Mr. Mills to be in round figures. He says the precise figures could be obtained. Do you care for those precise figures?

Mr. Driscoll: No.

The Witness: On Toronto, the sundry expense of \$28,639.17 is broken down in round figures as follows: —

Mr. Pollak: Appearing on Exhibit L-9.

The Witness: —in round figures: \$15,000 for provincial and dominion taxes; \$7,900 for Canadian exchange in connection with bonds and coupons especially. My recollection is that that company's bond issue was payable in either Canadian or United States dollars at the option of the holder. \$1,500 for directors' fees; \$1,500 secretary's salary; \$298 performance license; \$500 theatre license; \$350 auditor's fee; \$500 transfer agency, making in all \$27,458 of the total of \$28,639.17, the discrepancy being due to the fact that we took the wrong figures.

Mr. Pollak: Do you want more precise figures than that, Mr. Driscoll?

Mr. Driscoll: No, that is precise enough.

Hearing adjourned to June 30, 1937.

HEARING OF JUNE 30, 1937.

1579

Mr. Pollak: If your Honor please, this list of corporations, engaged in one way or another in theatrical exhibition, has been put in as Exhibit L-1. I think I explained to you it has been carefully checked and rechecked and one or two minor omissions were found. What is more important is that they have now been reclassified, as some of these corporations are corporations in which the only relation of Loew's or any company connected with Loew's is that of Manager simply.

We have prepared a new Exhibit L-1, classifying 100 per cent. owned companies, the partially owned companies and the companies themselves held through intermediate stages of ownership, sometimes two or three and I believe in one instance four, and finally the companies in which the relationship is, as I have said, a managerial relationship only.

1580

The Special Master: Are you going to substitute that for old L-1?

Mr. Pollak: Yes. I think old L-1 can be physically withdrawn.

The Special Master: Have you a copy for Mr. Driscoll?

Mr. Pollak: Yes (handing paper to Mr. Driscoll).

1581

The Special Master: Do you want old Exhibit L-1 kept in, Mr. Driscoll?

Mr. Driscoll: I just want to compare them to see what the difference might be.

Mr. Schlossberg: The Willard and Cornwall.

Mr. Pollak: Is that Willard Amusement Corporation which owns one or two theatres in Mt. Vernon the only difference?

Mr. Schlossberg: The Willard Amusement and also the Cornwall Realty Corporation.

Colloquy of Counsel.

1582

Mr. Pollak: That is among the partially owned with an interest in each case of somewhat over ten per cent.

Mr. Schlosberg: On the large sheet we have taken off the Moredall.

Mr. Pollak: May we just withdraw the old L-1? There is no change at all in the wholly owned companies.

Mr. Driscoll: We have no objection to your withdrawing the old exhibit.

The Special Master: You will withdraw the old Exhibit L-1 and mark this Exhibit L-1.

1583

(The document just offered, consisting of four sheets, was substituted in the place of the exhibit previously marked Defendants' Exhibit L-1, and marked accordingly Defendants' Exhibit No. L-1, of this date.)

Mr. Pollak: If your Honor please, on Exhibit L-7, if you will recall, there was some reference to certain asterisks, and we have found by checking, what we believed at that time to be true, that the asterisk marks appearing under Sundry Expense several times should all be omitted. We can physically erase them for you.

1584

The Special Master: That is all right. (The marks indicated on Exhibit L-7 were struck out with a pen.)

The Special Master: The two that correctly appear are the two in the last column, Per Week?

Mr. Pollak: That is right.

IRVING SCHLOSBERG, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows: 1585

Direct examination by Mr. Pollak:

Q. Mr. Schlosberg, you are an accountant with the defendants herein? A. That is right.

Q. Associated with Mr. Mills? A. That is right.

Q. Certain schedules of profits obtained by corporations whose stock was held by corporations whose stock was held directly or indirectly by the defendant, Loew's Incorporated, and also schedules of profits of corporations whose stock was not so held by Loew's Incorporated but whose theatres were managed by Marcus Loew Booking Agency—were those schedules prepared by you in association with Mr. Mills? A. That is right. 1586

Q. Have you got those schedules here with you? A. Yes (producing papers).

Mr. Pollak: Please give a copy to Mr. Driscoll.

The Witness: These are the corporations which were partly owned by subsidiaries.

Mr. Pollak: I offer first in evidence the statement of profit or loss of theatres operated by corporations in which said corporations Loew's Incorporated had indirect stock interest whole or in part through one or more intermediate corporations during periods in which "Letty Lynton" together with other attractions was exhibited. 1587

Mr. Driscoll: Is that substituted for something you had before?

Mr. Pollak: No, it is a new one.

The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-10 (of this date).

Irring Schlosberg—for Defendants—Direct.

1588 Q. Mr. Schlosberg, this Exhibit L-10 which has just been received in evidence has been prepared upon identical principles, has it not, with the exhibits already introduced showing the profit or loss of theatres owned by corporations whose stock was owned directly in whole or in part by Loew's Incorporated? A. That is right.

Q. Did you also prepare a schedule showing the overhead expense of theatres operated by corporations in which said corporations Loew's Incorporated had indirect stock interest in whole or in part through one or more intermediate corporations? A. I have. (Papers produced.)

1589 Q. Those are the same corporations that have appeared in the Exhibit last offered, L-10, is that right? A. That is right.

Mr. Pollak: I offer that in evidence.
The Special Master: Mark it.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-11, of this date.)

Q. Will you give me the schedule showing the corporations in which Marcus Loew Booking Agency has no stockholding interest, and acted in a managerial capacity?

1590 A. Yes (producing papers).

Q. In the case of these theatres, the only relationship was that of Marcus Loew Booking Agency under a managerial contract, is that right, Mr. Schlosberg? A. Yes.

The Special Master: These are the theatres mentioned on page 4 of Defendants' Exhibit L-12.

Mr. Cohen: That is right.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-12, of this date.)

Irving Schlosberg—for Defendants—Direct.

Mr. Pollak: I offer in evidence schedule of overhead expense of theatres listed in Exhibit L-12, managed by Marcus Loew Booking Agency. 1591

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-13, of this date.)

Q. Mr. Schlosberg, without undue repetition, if you can answer this in a generalized way do it? Have these two exhibits, L-12 and L-13, showing respectively the profit or loss for the weeks in question of Marcus Loew Booking Agency as manager of the theatres therein listed, been prepared on the same basis as the previous exhibits having to do with corporations owning theatres? A. They have. 1592

Mr. Pollak: Mr. Driscoll, do you accept these four exhibits, L-10, L-11, L-12 and L-13, as establishing prima facie, subject to your right of cross examination, the matters of fact therein set forth?

Mr. Driscoll: Establishing prima facie the matters therein set forth.

The Special Master: Does that complete the documentary evidence on this Loew's accounting?

Mr. Pollak: Yes, with the qualification that as you recall Mr. Driscoll called for certain matters to be investigated, and whether any of the answers to that are in a form that is documentary I do not know. 1593

The Special Master: Are you ready to have him cross examine, if he is ready?

Mr. Pollak: Yes, I am ready. Do you want to cross examine Mr. Mills first or Mr. Schlosberg?

Mr. Driscoll: It doesn't make any difference. I will take them both together if you want me to.

Mr. Pollak: Mr. Master, there should be added

Jesse T. Mills—for Defendants—Recalled—Cross.

1594

to Exhibit L-8 a further statement of profits of two more companies in which there was a partial stock interest. These two show an interest of about ten per cent., and a profit of \$222.02 in the aggregate.

The Special Master: You want that added to Exhibit L-8?

Mr. Pollak: Yes.

The Special Master: We will mark it Exhibit L-8 plus.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-8+, of this date.)

1595

Mr. Pollak: May I have it on the record that no point is made by the plaintiffs that in respect to the three theatres, the Willard owned by the Willard Amusement Corporation, the Mt. Vernon also owned by the Willard Amusement Corporation, and the Plaza owned by the Cornwall Realty Corporation—no point will be made of the absence of detail of computation of the overhead?

The Special Master: All right.

1596

JESSE T. MILLS, recalled:

Cross examination by Mr. Driscoll:

Q. Yesterday we produced here and offered in evidence the managerial or box office statements as to the theatres appearing on Exhibit L-6. They were marked Exhibit B to B-45 inclusive. Now, the next list of theatres, the list that appears on Exhibit L-8; have you the box office statements in a similar manner for those theatres appearing on L-8? A. Yes.

Jesse T. Mills—for Defendants—Recalled—Cross.

Q. Will you kindly produce them? A. Yes. (Photo-
stats produced.) 1597

Mr. Driscoll: I offer them in evidence.

(The photostatic copies of managers' reports were marked respectively Plaintiffs' Exhibit No. C to Plaintiffs' Exhibit No. C-23, inclusive, in evidence, of this date.)

The Special Master: Have you copies of those, Mr. Driscoll?

Mr. Driscoll: We have copies.

1598

Q. Now, the next list of theatres appears on Exhibit L-10. Have you similar box office statements for those theatres? A. Yes (producing photostats).

Mr. Driscoll: I offer them in evidence.

(The photostats just offered were received in evidence and marked respectively Plaintiffs' Exhibit No. D to Plaintiffs' Exhibit No. D-20, inclusive, of this date.)

Q. And finally, we have a list of theatres on the exhibit marked L-12. Have you similar statements for those theatres? A. Yes; there are eight altogether (producing photostats). 1599

Mr. Driscoll: I offer them in evidence.

(The photostats just offered were received in evidence and marked respectively Plaintiffs' Exhibit No. E to Plaintiffs' Exhibit No. E-7, inclusive, of this date.)

Jesse T. Mills—for Defendants—Recalled—Cross.

1600

Q. Mr. Mills, I asked you yesterday to produce certain checks. Have you got those checks with you today? A. We have produced Alpine Theatre checks.

Q. Mr. Mills, I would like to ask you a question or two in regard to this Alpine Theatre. You have produced here four checks, three of which have been paid and on one of which the signature is destroyed, drawn on Loew's Alpine Theatre account. Those are the checks, I presume, that are referred to in the statement that has been marked in evidence? A. They are. Exhibit C.

1601

Q. As Exhibit C. Just to find out how this is done, you have here first a check dated June 13, 1932, in the amount of \$763.05 that is payable to M. Waldman, Manager, and that is in payment of the payroll for the week. A. The payroll and the petty cash item of \$29.55 in the next column, also listed under check 1066.

Q. Waldman was the manager of the theatre? A. Yes.

Q. And the check was made payable to him and he cashes it and pays the employees? A. And the petty cash, the petty cash fund.

1602

Q. The next check that you have is a check for \$2,248.15; that covers the second column, which is headed Trade Bills, and the third column which is headed Films and Acts, I assume; they seem to total up to \$2,248.15. A. Yes; that covers all the items in those two columns except the \$29.55 petty cash which is included in the check number 1066.

Q. That is, trade bills and films and acts? A. With the exception of the petty cash.

Q. That check is made to the Marcus Loew Booking Agency and seems to be paid to the Marcus Loew Booking Agency. In other words, the method used there was for the manager of the theatre to give to Marcus Loew Booking Agency a check to cover the items of trade bills and films and acts? A. That is right.

Q. And the Marcus Loew Booking Agency in turn paid these trade bills and films and acts? A. That is right.

Jess T. Mills—for Defendants—Recalled—Cross.

Q. What was the interest of the Marcus Loew Booking Agency in the Loew's Alpine Theatre? A. Marcus Loew Booking Agency had no interest in the theatre; they merely acted as disbursing agents and purchasing agents. 1603

Q. Was the same method followed out in regard to all of Loew's theatres? A. Yes.

Q. So that each manager of each theatre at the end of the week would draw a check from his theatre account to the order of Marcus Loew Booking Agency for the total amount, generally speaking—there might be an item missing here and there, but the joint amount of the column that appears on these exhibits headed Trade Bills and the column which is headed Films and Acts? A. That is right. 1604

Q. Each manager paid those two items or the total of those two items to Marcus Loew Booking Agency, and they in turn, for each one of the theatres, disbursed the money? A. That is correct.

Q. Was that method followed out where Loew's Incorporated owned the theatre 100 per cent.? A. Followed in all cases irrespective of whether they owned 100 per cent. or were simply disbursing agent and clearing house. Duplicate bills are rendered to the theatre so that he knows his full detail of all these items, but instead of paying the individual seller he pays the Booking Agency, which combines the items and makes one check for maybe 50 items, making a saving in writing a great many checks. 1605

Q. The only individual items that the manager pays are the payroll items, except for small petty cash? A. Except for small petty cash, this is correct.

Q. Now, in Exhibit L-8 you have given us a statement of profit or loss of theatres owned in part by Loew's Inc.

Mr. Pollak: Pardon me; operated by corporations.

Q. Operated by corporations partly owned by Loew's Inc. A. Right.

Jesse T. Mills—for Defendants—Recalled—Cross.

1606

Q. Do I understand correctly that in one of the other exhibits that you have already given to us you show the interest of Loew's Inc. in those corporations that operate those theatres? A. That is correct.

Q. That appears in the substitution, in the new L-1. And in each case on Exhibit L-8 you have the name of the company that is operating the theatre, in the third column, and in the third column from the other end of the page you have Loew's interest in that particular operating company? A. Not Loew's interest in the particular theatre. You will recall it in the testimony I think that I gave the other day attention was called to the fact that sometimes these percentages varied from the stock ownership in the cases where we had pooling agreements.

1607

Q. Does that apply to any interest in theatres where you had only a partial interest? A. It does.

Q. In other words, you might own 60 per cent. of the stock and only get 50 per cent. interest in the operation of the theatre? A. Yes. As a very clear example you will find some theatres 50 per cent. owned in our pool with some theatres of 100 per cent. owned companies, so that our eventual interest is 75 per cent.

Q. So that this third column from the right gives your percentage of ownership in the operation? A. Not the theatre.

1608

Q. And not the stock ownership? A. That is correct.

Q. Now, then, that brings us to L-10, and that purports to be a profit or loss statement of theatres operated by corporations in which said corporations Loew's Inc. have indirect stock interest whole or in part through one or more intermediate corporations. That is sort of involved and I am anxious to know just about what it means. A. I think that the schedule, that wide page schedule originally attached to L-1 clarifies that. That Bay Ridge Theatre, if you notice the first one on this list of L-10, you will notice by referring to the wider sheet of L-1 exhibit that that

Jesse T. Mills—for Defendants—Recalled—Cross.

theatre is operated by the Ridgebay Amusement Corporation, which corporation in turn is owned by the Diamond Amusement Corporation, and the Diamond Amusement Corporation is owned by Loew's Incorporated. 1609

Q. 50 per cent.? A. 50 per cent., that is right.

Q. Which amounts to Loew's having a 50 per cent. indirect—or what shall we call it?—through intermediate corporations, a 50 per cent. interest in the Bay Ridge Theatre? A. Yes, and it is so stated there.

Q. And in the case of the Canal Theatre, which is operated by the Ludlow Operating Corporation? A. Yes.

Q. And that is owned 100 per cent. by Loew's Theatre and Realty Corporation? A. That is right.

Q. And that is owned 100 per cent. by Loew's Incorporated? A. That is right. 1610

Q. So that Loew's Inc. has 100 per cent. beneficial interest in that particular theatre? A. That is right.

Q. Just so we understand what it all means. Now, then, that brings us to the list of theatres appearing on Exhibit L-12, eight theatres. I infer from that you have stated that in the instances of those eight theatres the Marcus Loew Booking Agency manages the theatres without an ownership interest in the operation? A. That is correct.

Q. On what basis does the Marcus Loew Booking Agency manage the theatres? Is it on a percentage basis? A. On a fee, measured by a percentage of the profits. They manage it for the account of the landlord. 1611

Q. And this statement in the third column from the right, does that purport to give Loew's percentage of interest because of its management of the theatre? A. That is correct.

Q. So that in the case of the Broadway Theatre it is managed by Marcus Loew Booking Agency and because of that management Loew's Incorporated received 50 per cent. in the profits of the enterprise? A. No; Marcus Loew Booking Agency.

Jesse T. Mills—for Defendants—Recalled—Cross.

12 Q. Then ought the column, the third from the right, be headed Marcus Loew Booking Agency instead of Loew's Inc.? A. Strictly speaking, it should.

Q. I want to find out if it should.

Mr. Pollak: We don't object to it. I think you are asking him for a mere characterization.

The Special Master: That is perfectly simple. This Marcus Loew Booking Agency is wholly owned by Loew's Incorporated?

The Witness: That is correct.

The Special Master: Then the heading is wrong really.

15 The Witness: In that case the heading is wrong on other exhibits preceding this.

Mr. Pollak: It comes out the same thing.

Q. Mr. Mills, in the cases of those eight theatres the show is booked by the Marcus Loew Booking Agency?

A. As agent for the landlord.

Q. The Marcus Loew Booking Agency has the say-so in the making up of the show, operating the entertainment and booking the show? A. Yes.

By the Special Master:

14 Q. As with other theatres, the cost of the feature "Lettie Lynton" has been accounted for in the other accountings?

A. These theatres do not appear in any other schedule.

By Mr. Driscoll:

Q. It is true that as to these theatres that we have in all exhibits, wherever there has been a payment for the use of the picture "Lettie Lynton" in any particular theatre for the time set forth in those schedules, that that payment has been accounted for in the accountings already in evi-

Jesse T. Mills—for Defendants—Recalled—Cross.

dence before the Special Master and the money accounted for by the Pictures Corporation or the Distributing Corporation? A. Yes. I did not understand the question. 1615

Q. That is true in every case? A. It is true in every case.

Q. Who hires the help for these various theatres, the manager of the theatre or the Marcus Loew Booking Agency? A. The manager of the theatre may hire certain classes of help, and Marcus Loew Booking Agency acting as agent for the landlord hired the higher paid help.

Q. The Marcus Loew Booking Agency would hire the more important help, like the treasurer? A. The treasurer, the manager, assistant manager and people like that.

Q. And the Marcus Loew Booking Agency would also, I assume, make up the programs? A. Yes. 1616

Q. If it involved vaudeville the Marcus Loew Booking Agency would book the vaudeville acts? A. Yes.

Q. Or if it involved an orchestra the Marcus Loew Booking Agency would book the orchestra? A. Yes, always acting as agent for the landlord.

Q. Is the Booking Agency in existence now? A. Yes, it is.

The Special Master: Any re-direct examination?

Mr. Pollak: I don't think so. Mr. Driscoll, on this Exhibit E-12, the third column from the right, which at present says "Loew's Inc. Percentage of interest", we think in the interest of clarity should be physically amended to read, "Compensation of Marcus Loew Booking Agency based upon the following percentage of profits". I ask your permission to mark it in ink on the original. 1617

The Special Master: That is all right so far as I am concerned.

Mr. Pollak: Similarly in the next column over, the words "Loew's Inc." will be erased and it will read "Amount of Profit or Loss".

Alexander Lichtman—for Defendants—Direct.

1618.

(The indicated changes were effected on Defendants' Exhibit L-12.)

The Special Master: I assume it is in the record that the Marcus Loew Booking Agency is the wholly owned subsidiary of Loew's Incorporated.

Mr. Pollak: I think it is, but at all events it can be stipulated on the record now.

The Special Master: You are finished on your cross examination on this case, Mr. Driscoll?

Mr. Driscoll: Yes.

1619

The Special Master: And you are finished on your direct examination?

Mr. Pollak: Yes.

ALEXANDER LICHTMAN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name, residence, and occupation?

A. Alexander Lichtman, 101 Central Park West, New York City, Vice-President of Loew's Incorporated.

1620

Q. Would you tell us in a general way your experience in the moving picture business? A. I have been in the motion picture business for 27 years in executive capacity with several companies over that period. I was in business for myself as a producer and distributor.

Q. What executive positions have you held? A. I was general manager in charge of distribution for Paramount for ten years, United Artists for about the same period, about ten years, and I have been with Loew's Incorporated since November, 1935. In the interim I handled, produced and distributed pictures for myself and partner.

Alexander Lichtman—for Defendants—Direct.

Q. United Artists is the company that has my friend Mr. Driscoll as one of its important figures on the legal side? A. As counsel, with Mr. O'Brien. 1621

Q. Of course, you know Mr. Driscoll? A. Very well.

Q. Mr. Lichtman, your experience, I think you have already said, includes both production and distribution?

A. Yes, sir.

Q. What were you doing in 1932? A. I was Vice-President in charge of distribution for the United Artists.

Q. I am going to put to you one or two questions that may be leading, and unless Mr. Driscoll objects I guess we can get ahead rapidly that way. Am I right in this, Mr. Lichtman, that in the case of a given motion picture the ratio of drawing power ascribable to the written material, as compared with the total drawing power, that that varies from picture to picture? A. Yes. 1622

Mr. Driscoll: I object to that as incompetent, irrelevant and immaterial and calling for a conclusion; on the further ground that it is about something that is not on trial or referred to the Special Master for decision. I move to strike out the answer.

The Special Master: Overruled.

Mr. Driscoll: Exception.

Q. Mr. Lichtman, is this true, that the better known the stars in a given picture are, other things being equal, the larger will be the ratio of attractive power ascribable to those stars? 1623

Mr. Driscoll: Same objection. I want to make it to all these questions if Mr. Pollak is to continue along the same line, and if it is understood that my objection applies to all of these questions I won't repeat it each time.

The Special Master: That is all right.

Mr. Driscoll: With an exception each time.

Alexander Lichtman—for Defendants—Direct.

1624

Mr. Pollak: You may answer. (The preceding question was read by the stenographer.)

A. Yes.

Q. And is it also true that the more favorably known a given producing company is the larger will be the attractive power ascribable to the company? A. Yes.

Q. And similarly if a given producer is better known, the larger will be the ratio of attractive power ascribable to him; is that right? A. That is right.

Q. And similarly as to the director, I take it? A. Yes.

1625

Q. Now, Mr. Lichtman, can you tell us from your knowledge of motion picture conditions as they were in 1932, whether or not at that time Miss Joan Crawford was a star of the first magnitude? A. She was.

Q. And can you tell us also whether at that time Mr. Robert Montgomery was a motion picture actor of distinction? A. Yes.

Q. What was the status in 1932 in reputation among producing companies of M. G. M.? A. The best.

Q. What was the reputation of Mr. Thalberg? A. The highest, as a producer.

Q. What was the position of Mr. Clarence Brown, as a director? A. He was one of the foremost directors.

1626

Q. Now, are you familiar with the position of Mr. Stromberg at that time? A. Yes.

Q. What was that position? A. One of the producers for M-G-M.

Q. Are you familiar with his general status and reputation in the movie world? A. He was considered one of the very best producers in the world.

Q. And was so considered at that time? A. Yes.

Q. Now, Mr. Lichtman, getting back specifically to the contribution to attractive power that the written material makes, am I right in this, that the contribution of the written material is greater, other things being equal, if

Alexander Lichtman—for Defendants—Direct.

the picture as produced bears a name very well known in literature? A. That is right.

1627

Q. Taking as an illustration the name "David Copperfield" or "Ben Hur", would the attractive power of the written material upon motion picture audiences be greater with such a production as that, or "Peter Pan", than with some picture bearing a colorless name? A. Varying in degree from "Ben Hur" to the highest degree, that would be considered the prime attraction. Naturally the finished picture would be enhanced if the players acting therein were the best known and popular, but "Ben Hur" would be, in the custom of our business, in the vernacular of our business, would be billed over the player. To a slighter degree the others that you mentioned, "Copperfield" and "Peter Pan", to a slightly less degree.

1628

Q. Am I right in this, that even in the case of pictures bearing very famous names, there is a contribution to their drawing power from the names and reputations of the stars and the director and the producer? A. Decidedly so.

Q. And, other things being equal, the contribution of stars and producers and directors and of the reputation of the producing company is the greater, the better and more favorably known they are; is that correct? A. That is correct.

Q. And, other things being equal, the contribution of the written material is greater if the written material is associated with some name famous in literature, for example, and less if the written material bears a colorless name? A. That is right.

1629

Q. Now, take a picture with Crawford and Montgomery as stars, Stromberg as producer, Brown as director, bearing a name not identified with any well known play or story, under conditions existing in 1932, what proportion of the gross receipts would you say was ascribable to the written material? Do you understand the question?

Alexander Lichtman—for Defendants—Direct.

1630

Mr. Driscoll: Objected to. I object to the form of the question; objected to as incompetent, irrelevant and immaterial, not within any issues referred to the Special Master for trial here.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. I would consider the written material worth, against the total values in connection with the producer, directors, stars just mentioned, as being worth about, not more than ten per cent., and perhaps ~~10%~~ of the total.

1631

Q. Mr. Lichtman, passing to another aspect of this case, you are familiar, are you not, with the purposes and operations of the Hays organization? A. Yes.

Q. Could you tell us in general terms what the purposes and operations of the Hays organization are, and what relation it bears to the production and distribution of moving pictures?

Mr. Driscoll: I can't see what that has to do with it.

Mr. Pollak: I think there has been criticism made by you of the payments made to the Hays organization. If objection to that payment is withdrawn there is no use of this proof.

1632

Mr. Driscoll: My contention is whatever you paid to the Hays organization is based on the gross receipts and therefore if you paid out that year or the next year a certain amount you are entitled to deduct it. I have made no objections to the payments made to the Hays organization.

Mr. Pollak: With your statement I think there is no need for pursuing this line of examination.

The Special Master: Are you ready for cross examination?

Alexander Lichtman—for Defendants—Direct.

Mr. Pollak: Mr. Cohen properly reminds me of a matter that I wish to ask Mr. Lichtman about.

1633

Q. Are you familiar, Mr. Lichtman, with the practice of motion picture companies of having certain employees in reserve who may at a given moment be unassigned to any given work, are you familiar with that practice?

A. Yes.

Q. It exists, for one thing, in relation to writers, does it not? A. I can best answer that that we produce about 52 motion pictures a year and we employ more than 100 writers continually on a permanent pay roll, in addition to which we employ special writers from time to time for special subjects. So that on the theory that it might take one man to write one story you can readily see that we employ more than one, we employ more than two per story. Often one writer may start one story and his work be not found satisfactory and his work be turned over to another, and the first writer may be idle until another assignment comes along.

1634

Q. Mr. Lichtman, this you may answer yes or no. Is this practice of having unassigned authors general in the motion picture production business, or is it not?

Mr. Driscoll: Objected to as immaterial.

A. It is general.

1635

The Special Master: I think the witness has answered the question that you put. I don't think you need to go into it any further. I think you have made whatever point there is.

Q. It is a fact in the motion picture world, is it not, Mr. Lichtman, that a single producing company produces in the course of the year some scores of pictures? A. Yes.

Q. Mr. Lichtman, in your judgment if writers and actors

Alexander Lichtman—for Defendants—Direct.

1636 were uniformly hired solely for a single production, would the cost be greater or less in operating a motion picture studio?;

Mr. Driscoll: I object to that. That has nothing to do with the issues here. We are not interested in the motion picture business beyond the taking of "Dishonored Lady" and making it into "Letty Lynton".

Mr. Pollak: That is a point of law, a point on which we naturally differ with you. We want the fact; Mr. Master, and I think we are entitled to have it.

1637 The Special Master: The trouble is that I thought we developed that angle completely out on the Coast. Go ahead and answer.

Mr. Driscoll: Exception.

(The pending question was read.)

A. I believe higher.

Q. Will you, in your own way, state your reasons for your conclusion?

Mr. Driscoll: Same objection made to that question.

The Special Master: Go ahead and answer.

1638 Mr. Driscoll: Exception.

A. Naturally, if offered employment for a period of time, which is the custom usually when an actor shows talent and promise, he is signed for several years, sometimes with options for one year and then options for seven years. Naturally under that arrangement his future for that period is secure and the publicity behind such a performer is valuable to him because if he is under a long term contract the company publicizes him, so that the compensation

Alexander Lichtman—for Defendants—Direct.

in money would be smaller than if he were hired picture by picture or week by week. 1639

Q. Mr. Lichtman, in your experience in the motion picture industry, do you know of any case in which the author of a play or story or other written material himself produced a motion picture from that written material? A. I know of no single picture ever made—

Q. Mr. Lichtman, do you know of a single motion picture, consequential or inconsequential, which since the days of sound has been produced by the author? A. By himself?

Q. Yes. A. No.

Q. Or which has been produced otherwise than through a motion picture producing company? A. No, I do not. 1640

Q. And that applies, whether my question relates simply to an author or to any other copyright owner? Do you understand my question? A. Yes, I think I do.

Q. You know of no such case? A. No.

Q. You know of no such production since the days of sound otherwise than through a motion picture production Company? A. I would like to say that there may be some companies that are organized only to produce one picture and then cease to produce them. There are small companies in the business which may run a studio to produce a motion picture; but I know of no author alone who has taken his work and produced it into a motion picture; I know of none. 1641

Q. From your experience in the motion picture business is it possible to produce a feature picture without the various departments contained in the M-G-M studio at Culver City, or substantially without those departments?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues that we are trying here in this accounting.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

Alexander Lichtman—for Defendants—Cross.

1642 A. You could not make a motion picture of good quality without a studio containing all the necessary departments, substantially such as there is at the M-G-M studio.

Q. And that would be true, would it not, in 1932 as well as today? A. Yes, sir.

Cross examination by Mr. Driscoll:

Q. Mr. Lichtman, Mr. Pollak was asking you whether you knew any authors that produced their own pictures. There are and have been a number of independent productions, haven't there? A. I said yes, Mr. Driscoll.

1643 Q. Charlie Chaplin produces his own pictures, always? A. Yes.

Q. And Harold Lloyd? A. Yes.

Q. Fairbanks produced his own pictures? A. Yes.

Q. And Miss Pickford produced her own pictures? A. Yes.

Q. In fact, there have been instances of that type? A. Yes.

Q. Producing their own pictures and not going into production in a big way such as Mr. Pollak referred to? A. Yes.

1644 Q. You also testified, in response to Mr. Pollak's questions, or Mr. Pollak I think made the statement and you agreed, that the better the company the better chance the picture has of being good, and the better the producer the better chance it has of being good, and the better the director the better chance it has of being good; and I suppose the better the weather the better chance there is of having a good box office? All of these factors have to do with the amount drawn into a box office, don't you think so, Mr. Lichtman? A. Yes.

Q. You can't confine it to the making of the picture or the attractiveness of a picture or the box office there is in the picture or any one thing or any one element? A. Not any one element; it takes a great many elements.

Alexander Lichtman—for Defendants—Cross.

Q. As a matter of fact, often what you expect to be a great big successful picture is often times a flop? A. Very often that happens. 1645

Q. Often times what you expect to be a very ordinary picture turns out to be a real moneymaker? A. Very seldom.

Q. But it does happen? A. Yes, it does happen, but very seldom.

Q. Speaking of Miss Crawford, Miss Crawford made "Rain" for Art Cinema in 1932, I think it was, and that was one of the flops, wasn't it? A. Yes.

Q. And Art Cinema was itself a producing company producing pictures under the leadership of one of the outstanding men in the business? A. Yes. 1646

Q. And Art Cinema was a flop? A. Yes.

Q. And they lost money? A. Yes.

Q. So that when all is said and done it is a combination of elements that tend to success or failure of any particular picture? A. That is right.

Q. Do you know what was paid for "Room Service"? A. Not direct knowledge; I heard of it.

Q. What was your information? A. I heard that 200 or \$250,000 was paid.

Q. Or \$245,000? A. I heard some such sum as that.

Q. So that if the material is only ten per cent. of the value of the picture you would have to have a picture there of approximately two and a half million dollars? A. Very often producers overpay. 1647

Q. For material? A. For material or actors or anything else.

Q. In addition to "Room Service" there are a number of outstanding illustrations. You take, for instance, "Abie's Irish Rose", they paid what for that; do you know, Mr. Lichtman? A. I don't remember that.

Q. Do you remember that it was \$300,000 on a split?

A. I heard some such large sum of money.

Alexander Lichtman—for Defendants—Cross

1618 Q. If it represented only ten per cent., they would have to make \$3,000,000? A. It would be excusable for a producer to pay a large sum of money for a play that ran a large number of years, because it became as well known as any play that was ever produced. Sometimes you produce a play and pay a large sum of money because of the value of the play itself, because that was a very ordinary story, but because of the reputation it had gained for drawing value over those years; that is the reason they paid it.

Q. So that reputation and run of the play are among the other elements that have to be taken into consideration? A. They are very important elements as to value.

1649 Q. Very important elements? A. Very important.

Q. Let's see: "Dinner at Eight", Metro bought that, didn't it? A. Yes.

Q. How much did it pay for that? A. I believe about \$160,000 for that.

Q. Ten times that would be \$1,600,000, wouldn't it? A. When you said 10 per cent., gross or cost?

Q. I was taking your testimony. You understood, in answer to one of Mr. Pollak's questions you said that the written material represented not more than ten per cent., of what? A. Of the total cost of that picture; that would be at the outside, I would say.

1650 Q. If "Dinner at Eight" cost \$160,000 for the written material, that would justify the cost of a picture of \$1,600,000? A. I had in mind; Mr. Driscoll, this; you must distinguish between "Litty Lynton" and "Dinner at Eight". "Dinner at Eight" was a distinguished play of great reputation. It was treated accordingly. All of the great stars of M-G-M were placed in the parts and they made a great big super-colossal feature picture out of it and they grossed a great deal of money out of it.

Then you have stories which studios buy simply because they fit certain of their stars, certain featured stars can enact those roles well. They may be of ordinary value.

Alexander Lichtman—for Defendants—Cross.

They try to buy them as cheaply as they can. They have no particular drawing value. You could have called it "Letty Smith" and it would have been the same for box office value, or "James Smith" or some other title, so long as it is not degrading to a girl of Joan Crawford's fame. You must distinguish there. 1651

Q. Now, taking your testimony, Mr. Lichtman, when you paid \$160,000 for "Dinner at Eight", you did not know that the picture was going to take in this great big box office? A. No, you never know.

Q. So that the great big box office has nothing to do with it, except it might raise your expectations with the price that you pay for a play? A. You approach it in every department with an air of importance. You take greater care in production. You appropriate larger sums of money to produce a thing as good as that than you would something that was just a good story. 1652

Q. When you go out to buy a play of distinction, Mr. Lichtman, you don't say, "Well, we could get this for \$160,000, but we will pay \$150,000 because we are going to put in some outstanding stars rather than some ordinary people"? A. No.

Q. So when you go out to buy a play you get the play as cheaply as possible? A. Yes.

Q. The fact that you paid \$160,000 for "Dinner at Eight" was not affected at all by the players you put in it or the box office looked attractive? A. No, the consideration of doing that is because the play had been established as an outstanding success and it seemed to the producers that it should make a good motion picture and, therefore, it might be well to meet the competition, because competition runs up that price. 1653

Q. Exactly. Isn't it true, Mr. Lichtman that you paid \$160,000 for it because you couldn't get it for less? A. Naturally.

Q. So with "Ben Hur", how much did you pay for "Ben Hur"? A. An enormous sum of money.

Alexander Lichtman—for Defendants—Cross.

1654 Q. It was much over that? A. Yes.

Q. Wasn't it over half a million dollars? A. It was a participating agreement.

Q. And they are still sharing? A. If there is still income there; if the picture is showing. That was a distinguished work, one of the greatest in the world.

Q. It is also true that the value of a piece of literary material or any other piece of motion picture property varies with the individual that wants it? There isn't any standard on any piece of property? A. No, no standard.

Q. You might be willing to pay \$160,000 for "Dinner at Eight" when another producer might be willing to pay \$175,000? A. Yes, and another one wouldn't give you \$10.

1655 Q. Do you know how much was paid for "You Can't Take It with You"? A. Yes, I think so.

Q. How much? A. \$200,000. I wouldn't give you \$50 for it.

Q. Do you recall how much was paid for "Way Down East"? A. I think 150.

Q. Thousand? A. Yes.

Q. There are many elements, as you said before, are there not, that enter into the success or failure of a picture, at the box office? A. That is right.

Q. And in so far as business is concerned, the success or failure of a picture is measured by its success at the box office, is that correct? A. Yes.

1656

Q. You don't care how artistic, how much of a success it is artistically, if it does not bring in success at the box office? A. You judge a picture two ways. You judge a picture from the artistic standpoint, and you judge it from a commercial standpoint. From the commercial standpoint you judge it by what it brings in at the box office. For instance, we have a motion picture today, called "Captains Courageous". We get great satisfaction out of that picture because it is a fine spiritual work, and we consider it a credit to the company and to the industry as a whole.

Alexander Lichtman—for Defendants—Cross.

and although we will make no money out of it, we are satisfied. 1657

Q. If you lose money on it you will not be satisfied. A. We will lose money on it, but we are satisfied because we consider it a contribution to the industry.

Q. Isn't it also true that a picture, or play for that matter, may succeed in one city and fail in another city?

A. Yes.

Q. It is part of the exigencies of the business? A. Yes.

Q. In addition to the story, the plot, the dialogue, the characters and the development of the plot and the other elements of the play that enter into the success or failure of a picture, there are many other things that enter into the success or failure of a picture, aren't there? A. Yes. 1658

Q. And it is a fact, however, that all of those things do enter in, that is, the story, the characters in the story, the plot, the dialogue, its development, all of those things enter in? A. Yes.

Q. They are intangible; you can't say how far they enter in, but they do enter in? A. When you are doing a thing for a great many years, your experience sort of gives you an instinctive sense of value about these things. For instance we can tell by looking at a motion picture what it will gross. That comes from experience. We can look at what appears to be a very good picture and we will say, "This picture will not please the public. They will not come in to buy it." We may not be able to give the reasons why but our experience tells us it will be a flop, for one reason or another. 1659

Q. That is why you are in the business, isn't it? A. You acquire that, the same as in your profession your experience gives you the feel of things.

Q. And with that acquired skill you are not able to tell with any degree of certainty what element is responsible for the success or failure of a picture? A. In a degree you can.

Alexander Lichtman—for Defendants—Cross.

1660. Q. I said, any degree of certainty. A. With perfect certainty, no; but with a sufficient degree to enable you to make a decision, yes.

Q. Now, outside of the actors and the acting and the direction, there are a great many outside elements that enter into the success or failure of a picture, aren't there?

A. Yes. For example, Mr. Driscoll, you are speaking of this particular star, Joan Crawford. This picture was successful. The one you mentioned, produced by Art Cinema, was a failure. I happen to have been very close to that picture; you know I distributed it and I was very close to it. The producing company looked to me for advice about many things.

1661. We know that "Rain" was a successful play. It had been produced as a successful motion picture, silent, with Gloria Swanson as the star. Joan Crawford was about Miss Swanson's drawing power and popularity at the time she made "Rain" and the time Miss Crawford made the same story. But the spirit of "Rain" was not in the adaptation of the talking version. It was lost in the adaptation. It was not in the direction. The director, who dominated the whole production, who was also the producer—there was no producer over him—Milestone was the name—did it in such a way that the spirit of "Rain" was no longer in that thing. They spoke the lines that were written by the author, but you couldn't get the feel out of it. The picture had to appeal to the emotions. They couldn't get it over. But Crawford was not a failure in the next picture.

1662. Q. The emotion you speak of, that is one of the intangible things you can't put your finger on? A. I think it is pretty tangible for those who have the decision to make, for those who have to decide whether to use Crawford again for that type of play or whether you use Milestone again as a director for that sort of picture. It is tangible enough. It is to the profession, although it might not be to the layman.

Alexander Lichtman—for Defendants—Cross.

Q. When they put it together they didn't know it was going to lack the spirit of "Rain"? A. No, of course not. It cost a fortune. 1663

Q. That was one of the chances of the business; they missed fire? A. That is true; they missed fire.

Q. In addition to that there are many outside things that will influence the success or failure of a picture, such as the change in public sentiment towards a particular type of picture? A. That is possible, yes.

Q. For instance, the springing up of Legions of Decency will change the trend of pictures, and the aspect of a particular picture? A. Of a particular picture possibly, not the trend of pictures; that is too broad. 1664

Q. A picture that might have a prospect of success but for the activities of the Legion of Decency? A. I wouldn't go so far as to say that, Arthur. There were a few pictures that were objected to by the Legion of Decency at the time of that activity on their part, which I think had to be altered before they were ultimately released.

Q. Do you think it has affected the marketability of Mae West's products? A. Up to the time that Mae West apparently lost her popularity her pictures were doing a terrific business.

Q. She lost her popularity just about the time the Legion of Decency started activities, didn't she? A. About; just a little before that, I should say. 1665

Q. Another element that comes into the situation is an element of competition. If you have a particular type of musical, if a number of them came into the field at the same time the chances of success are thereby lessened, aren't they? A. No. There was a time before the talking pictures were perfected to their high degree of efficiency. At about that time there were a number of musicals made very badly and the people became tired of them and wouldn't buy them. But later, when the musicals were made very much better, you can't give them enough, because they have learned now how to make them.

Alexander Lichtman—for Defendants—Cross.

1666 In the early days they did not know how. At first people went to them because they were novel and different and the market was flooded with them, and they were pretty bad, and they just stayed away. It was later, just about two years thereafter, they perfected them and they are the most popular pictures today.

Q. Isn't it a fact that when you have a picture any way out of the ordinary at all that you frequently race to get your picture released if you suspect or hear or think that another company is going to produce the same type of picture? A. Type? In such a broad category as musicals? No. But if, for instance, we were producing, Mr. Driscoll, a story of Napoleon and we heard that another company were also producing a story of Napoleon, we certainly would try to get out first.

1667 Q. Mr. Lichtman, take a picture like "Room Service"; assume that it cost \$245,000 or \$250,000 for the motion picture rights of that picture, isn't it a fact that no producing company could afford to make a picture of that costing two and a half million dollars? A. I wouldn't think so, but sometimes we do.

Q. You do foolish things? A. Sometimes we intend to make a picture to cost a million dollars and end up spending two and a half.

Q. If you spend two and a half million dollars in making a negative from the start, how much would you have to gross to get your money back? A. You would have to gross about \$4,000,000.

Q. That is a whale of a lot of money, isn't it? A. Yes.

Q. How many pictures have grossed \$4,000,000? A. Quite a few, but not as many as we would like to—in the world, I am speaking of.

Q. What percentage of the total output would you say had grossed \$4,000,000? A. The whole motion picture output?

Q. Yes. A. Let us see. About 700 pictures made—oh, not more than $1\frac{1}{2}$ per cent., two per cent.

Alexander Lichtman—for Defendants—Cross.

Q. One and a half in a hundred? A. One and a half per cent.; one and a half in a hundred. 1669

Q. Do you know of any \$4,000,000 gross last year? A. Yes.

Q. What was it? A. "The Great Ziegfeld" grossed more than \$4,000,000, in the world.

Q. In the world, yes. A. Let me see. I know that one definitely. There are several in distribution now, possibly two or three of our company that may reach close to that figure.

Q. The leading producing companies today pay fairly large salaries to the writers of their literary material, don't they, Mr. Lichtman? A. Yes.

Q. How high do those salaries run? A. The writers under permanent arrangement, do you mean? 1670

Q. Let us take them first. A. They run as high as \$3,000 a week.

Q. \$150,000 a year? A. Yes. Seldom are they employed 52 weeks a year. They are usually employed for 40 weeks.

Q. When you hire a writer for a particular picture, for a particular subject, you make a special contract with him for that? A. Yes.

Q. And that is likely to run as high as \$250,000 for a subject? A. I don't know of any that high.

Q. How high would you say it would run? A. Most of them are hired for so many weeks for so much a week. The highest I know of was \$5,000 a week on a special job, for a limited number of weeks. 1671

Q. There are a great many producing companies that have started in the business and that have gone under? A. Yes.

Q. In fact, there are big companies—there are only six or seven big producing companies in the business today, isn't that true? A. Yes.

Q. I suppose it would be fair to say that several hundred have started in the business from time to time? A. Yes.

Alexander Lichtman—for Defendants—Re-direct.

1672 Q. Those companies have gone under because they have not made a success of the business, isn't that correct? A. Yes.

Q. They have produced pictures that have not brought back sufficient to give them their costs out of it? A. Very likely.

Mr. Driscoll: That is all.

Re-direct examination by Mr. Pollak:

1673 Q. Mr. Lichtman, I have only a few questions. In the first place, as to these independent companies, the producing companies that you mentioned, I suppose when Charley Chaplin produced a picture he starred himself in it, is that correct? A. Yes, except one. He produced one without himself; "Woman of Paris".

Q. Generally speaking, he starred himself? A. Yes.

Q. He had been for years a person experienced in the motion picture world, had he not? A. Yes.

Q. And Mary Pickford, when she produced pictures did she star herself? A. Yes.

Q. And Harold Lloyd, when he has produced pictures did he star himself? A. Yes.

1674 Q. And these persons were themselves producers, among other things? A. Each of them, I think, had a big staff of people.

Q. And they had, all these, complete studios? A. Yes. Mary Pickford and Douglas Fairbanks jointly owned a studio. Chaplin owns his own studio.

Q. Mr. Lichtman, is this true, that when Charley Chaplin produces a picture in which Charley Chaplin appears, the attraction of Charley Chaplin as the star is a very great source of drawing power? A. Practically the whole drawing power.

Q. And in greater or less degree does the same go for Mary Pickford? A. Yes.

Alexander Lichtman—for Defendants—Re-direct.

1675

Q. And for Harold Lloyd? A. Yes.

Q. Now, returning to these cases that Mr. Driscoll cited of large sums paid for motion picture rights, is this correct: that where a large sum was paid for "Ben Hur" it was after the book "Ben Hur" had established a world-wide reputation under that name? A. Not only the book, but the play, for years.

Q. It was a famous play? A. Yes.

Q. Is the same true of "Dinner at Eight"? A. It was a great play.

Q. Is the same true of "Room Service"? A. "Room Service" is comparatively new. It started off with a very successful play.

1676

Q. But the payment in each case was made for the motion picture rights after the reputation of the book or play or book and play had been established, is that true? A. Yes.

Q. Is it true of every one of those cases that Mr. Driscoll alluded to by name? A. Yes.

Q. Now, Mr. Lichtman, Mr. Driscoll has put you some questions about the ratio of cost in particular cases between the written material and the total cost. I want to ask you this: taking now, not the cost, but the attractiveness of the picture to the public—will you forget about cost for the moment—its drawing power, which I suppose is best represented by gross receipts—taking the gross receipts and not cost, and taking a picture not bearing the name of any well known play or book but having M-G-M production, the direction of Clarence Brown, the immediate production of Stronberg and the supervisory production of Thalberg, and Joan Crawford as a star and Robert Montgomery as co-star, under conditions prevailing in 1932, what proportion of the gross receipts would you ascribe to the written material?

1677

Mr. Driscoll: I suppose you are asking him as Vice-President of Loew's Incorporated?

Alexander Lichtman—for Defendants—Re-direct.

1678

Mr. Pollak: I am asking him as an expert in the movie business.

A. I assume a very small percentage there.

Q. Put an outside figure. A. In 1932 I suppose a picture of that type should gross in the world about one million three or four hundred thousand dollars, and the rights to the story without adaption would be worth approximately \$25,000, and the adaption might bring it up to a total of 45 or 50 including the adaption; in other words, the second play. So that \$50,000 of one million three or four hundred thousand dollars—what percentage is that?

1679

Mr. Driscoll: \$100,000 would be ten per cent. of a million; \$50,000 would be five per cent. of a million.

A. (Continued.) It would be about 3½ per cent.

Q. Will you explain—forgetting for a moment any question of cost—what proportion, among the influences that induce persons to go to see that picture, what proportion you would ascribe to the written material?

Mr. Driscoll: Is this on the assumption that he has interviewed every one who has gone to see it?

1680

The Master: I think he has testified to that before.

Mr. Pollak: I am asking now how much—I don't care how much the cost was, for the present.

A. I understand.

Q. I want to know what the proportion of the drawing power of the picture upon the public, in your opinion, is at the time, in the case of a picture as I have described it, a picture produced in 1932 with Joan Crawford and Robert Montgomery as the stars, under the direction of Clarence Brown, with Stronberg as the immediate producer and

Alexander Lichtman—for Defendants—Re-direct.

with Thalberg as the supervising producer, and as an M-G-M production; I ask you how much of the drawing power of the production, in your view, at the outside, is ascribable to the written material. 1681

Mr. Driscoll: Objected to, of course, unless the witness can say that he has interviewed on a number of occasions all of the people attending a production and definitely ascertained on more than one occasion what the drawing power of the written material was. Otherwise he cannot qualify as an expert or prove what drew them into the theatre.

The Special Master: We will have to take the testimony for what it is worth. He doesn't pretend to have made that kind of investigation. 1682

A: I will answer it in this way: that in my opinion a picture based on a book or play, in which appear glamorous and popular stars, produced by a favorably known company by expert producers and director, that I am inclined to appraise that picture, I would place the value of that picture upon the value of those stars and direction—because you could not say that John Smith, a ticket buyer at the Capitol Theatre in New York, would value anything that he had not heard about. If "Jane Smith" was the title of the play and "Jane Smith" was the title of a book on it, it certainly means it was a picture with Crawford and Montgomery and Clarence Brown in an M-G-M picture. 1683

Q. When you say very little, would you give your own best judgment of an outside percentage? A. I would give it nothing.

(Discussion off the record.)

Q. You have testified, I think, that the proportion of pictures that have grossed over \$1,000,000 is, in your

Daniel Jaycocks—for Defendants—Direct.

1684 judgment, not more than one and a half per cent.? A. That is right.

Q. What proportion of pictures is there with respect to which as much as \$240,000 has been paid for the motion picture rights; what percentage of plays? A. I would say one-quarter of one per cent.

Q. And was the percentage any higher in 1932? A. I don't think it was any higher.

Q. Do you know what the highest price was in 1932 for the motion picture rights? A. I do not.

1685

HEARING OF JULY 6, 1937.

DANIEL JAYCOCKS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Will you kindly state your full name and present address? A. Daniel Jaycocks, 155 Highland Avenue, Montclair, New Jersey.

1686

Q. Mr. Jaycocks, what is your present occupation? A. I am general manager of Warner Brothers Theatres in New York.

Q. You have been connected with the motion picture business for a good many years? A. About eighteen years.

Q. I think once, many years ago, you were connected with the old Metro company? A. Yes, about sixteen or seventeen years ago.

Q. You are not now connected with any of the defendants in any capacity? A. No.

Q. Mr. Jaycocks, what was your occupation in 1932? A. I worked for Fox West Coast Theatres as assistant to the general manager.

Daniel Jaycocks—for Defendants—Direct.

Q. And your experience, among other things, is in the exhibition of pictures, is that right? A. Yes. 1687

Q. And was in 1932? A. Yes.

Q. Now, did the West Coast Theatres in 1932 exhibit among other attractions "Letty Lynton"? A. Yes.

Q. How many theatres, in 1932, were comprised in the West Coast chain? A. Over 400.

Q. In how many of those theatres was "Letty Lynton" exhibited? A. I should say approximately 300.

Q. From your experience in the exhibition of motion pictures can you form an estimate of the portion of the drawing power of an attraction and of the gross receipts of an attraction ascribable, generally speaking, to the stars? You might just answer that question yes or no, whether you can form an opinion as to the stars. 1688

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, and nonsensical.

The Special Master: Overruled.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. I would like you to ask me once more.

Q. (The preceding question was read by the stenographer.) A. I can form a general opinion.

Q. Is it your opinion, yes or no, that generally speaking the largest element in the attractive power of a production is the star? 1689

Mr. Driscoll: Objected to as leading, telling the witness what to testify to. I object to the form of the question. I object to it as incompetent, irrelevant and immaterial.

The Special Master: Objection as to the form sustained.

Q. Mr. Jaycocks, we will try it a little differently. I suppose some part of the attractive power of a production

Daniel Jaycocks—for Defendants—Direct.

1690 is due to the direction, is it not? A. A small part of the box office value, I should say.

Q. Some part is due to the name of the producer, is it? A. I should say a small part.

Q. And is some part ascribable to the company which is known to be the producing company? A. Yes, a small part, if it is an outstanding company.

Q. Is some part also ascribable to the written material or story? A. Yes, a small part.

1691

Mr. Driscoll: I want to record my objection to this entire line of testimony. Evidently the purpose for which this witness has been called is the same purpose for which one or two witnesses have been called here before, namely, an offer to prove something that is not before the Master for determination.

1692

I object to that as incompetent, irrelevant and immaterial, not before the Master for determination; and on the further grounds that no witness is competent to testify as to such as speculative matter as the portion of attraction due to any element of a picture. The Court of Appeals of the State of New York says nobody can tell what it would be. I don't see how this witness can set himself up as better than the Court of Appeals of the State of New York.

The Special Master: We will take the testimony over objection and exception.

Mr. Driscoll: Exception.

Q. What was the reputation of Joan Crawford in 1932?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Daniel Jaycocks—for Defendants—Direct.

A. She was an outstanding box office star.

1693

Q. We really know what the terms mean, but just to get the record perfectly clear what do you mean by an "outstanding box office star", Mr. Jaycocks? A. Over a period of years the larger part of the pictures she played in have always met with public appeal through the box office.

Q. What was the position of Mr. Robert Montgomery in 1932?

Mr. Driscoll: Some objection to that question.

The Special Master: Same ruling and exception.

Mr. Driscoll: Unless it is understood that my objections go to all this line of questions, it will be necessary for me to note my objections to each question.

1694

The Special Master: I take it your objection runs through the whole of this testimony, with the same ruling; and you may have an exception.

A. He had a public appeal, not as great as Joan Crawford, but good box office value.

Q. What was the reputation of M-G-M as a producing company in 1932? A. They had been then and still are for several years the outstanding producers of motion pictures in the country.

Q. What was the position of Mr. Thalberg in the motion picture business? A. He was the outstanding producer.

1695

Q. Have you heard of one Mr. Stromberg? A. Yes.

Q. What was his standing in 1932? A. Always been known as a good producer.

Q. You have heard of Mr. Clarence Brown, a director? A. Yes.

Q. What was his standing in 1932? A. For many years he has been known as a very fine director.

Q. And had been so known in 1932? A. Yes, and before then.

Daniel Jaycocks—for Defendants—Direct.

1696

Mr. Driscoll: Is it the position of the defendants that because these people were well-known they are to be absolved for taking this play in 1932?

Mr. Pollak: I think we have made our position pretty clear, but it will be made plainer in the findings.

1697

Q. Take a picture with Crawford and Montgomery as stars, produced by M-G-M, with Mr. Thalberg as supervisory producer, Mr. Stromberg as producer in direct charge of production, with Mr. Brown as director, bearing a name not identified with any well known play or story, under conditions existing in 1932, what proportion of the gross receipts was ascribable to the stars?

Mr. Driscoll: I object to the form of that question, incorporating a lot of facts that are not in the record and, therefore, unknown to either the witness or counsel on the other side.

The Special Master: I think that is objectionable as to form.

Mr. Pollak: All this has been testified to before.

Mr. Driscoll: The conditions that existed in 1932 have not been testified to, and you have put them in your question.

1698

The Special Master: I think the question is a little broad, Mr. Pollak, don't you?

Mr. Pollak: It is the same question, except that we have substituted "stars" for "story", that has been in this record repeatedly.

The Special Master: Go ahead and answer it.

Mr. Driscoll: Exception.

(The pending question was read.)

A. On account of the cast I would attribute about 75 per cent to the cast and about 25 per cent to the balance, the people that you name such as director.

Daniel Jaycocks—for Defendants—Direct.

Mr. Driscoll: I move to strike out the answer as not responsive to the question. 1699

The Special Master: Read the question and see if you can't answer it a little more specifically.

Q. (The pending question was read.) A. Instead of the cast, stars 75 per cent.

Q. What do you mean by "cast"? A. I mean Crawford and Montgomery, their box office values.

Q. And you assign the remaining 25 per cent to the other factors mentioned, is that right? A. To the director, to the producers, to the fact that the Metro company was behind the picture, that Thalberg oversaw the production of it, which generally meant a good picture, and those other factors bring it up. 1700

Q. What portion, taking if you will an outside percentage, would you ascribe to the story?

Mr. Driscoll: Objected to on all the grounds stated before and several others.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. It is rather hard to state a percentage. The only thing that I can tell you in that connection, we generally buy a program of pictures, 48 in a year, and the stories have very little to do with our deciding the value of the program. It is generally made up of the stars and the producers. 1701

Q. Take a picture with Crawford and Montgomery as stars, Thalberg as supervising producer, Stromberg as producer in immediate charge of the production, Brown as director, produced by the M-G-M companies, bearing a name not identified with any well known play or story, what proportion of the gross receipts would you say was ascribable to the story? A. Oh, about five per cent.

Daniel Jaycocks—for Defendants—Direct.

1702

Q. Now, Mr. Jaycocks, you have already told us that your company, the West Coast, bought this picture "Letty Lynton" for about 300 theatres? A. That is right.

Q. Did you personally have to do, Mr. Jaycocks, along with other things, with the acquisition for the West Coast chain of "Letty Lynton"? A. I was very active in the purchasing of all films for that year.

Q. Including "Letty Lynton" among them? A. Yes.

Q. Can you tell us on what basis the purchase of the Metro pictures for the West Coast chain was made in 1932?

1703

Mr. Driscoll: Objected to; no basis laid for the question. He might have been active running around the hall greeting visitors.

Q. You were the assistant to the general manager? A. Yes.

Q. In that capacity what did you do in connection with Metro pictures? A. The Metro pictures were purchased from the general sales manager of Metro, who was Felix Faust at that time. We held many meetings in Los Angeles and several meetings in New York before we completed the deal.

1704

Q. Was the personality and position of Joan Crawford a factor in the acquisition of this picture?

Mr. Driscoll: Objected to. This witness cannot testify whether or not it was a factor except from his personal opinion. To say it was a factor with every one in the West Coast is trying to give this witness a little more power and authority than facts warrant.

The Special Master: Let him tell what considerations did arise in their minds in the purchase of the pictures.

Daniel Jaycocks—for Defendants—Cross.

Q. What considerations were in your mind in the acquisition of the Metro pictures in 1932? A. Primarily the fact that they had collectively a majority of the outstanding stars in the motion picture industry, and that they were a large organization who over a period of years had consistently delivered box office attractions. 1705

Q. Did those considerations apply among others to the picture, "Letty Lynton"? A. I doubt at the time if we even thought of anything more than the stars and the organization in purchasing them.

Q. But Joan Crawford was one of these outstanding stars, was she not? A. Yes.

Q. If you recall, did you know when you purchased "Letty Lynton", the Joan Crawford picture, what picture it would be? A. I doubt it very much. 1706

Cross examination by Mr. Driscoll:

Q. As a matter of fact, your method of purchasing pictures from Metro at that time was to purchase them en bloc, wasn't it? A. Yes.

Q. You purchased in this particular instance 48 pictures? A. I imagine so, about that number.

Q. And that was perhaps the entire output of Metro for the year? A. Yes, unless they had some special attractions.

Q. As a matter of fact they released 41 pictures of their own that year, so that I think that includes Cosmopolitan, so that you purchased the entire output of Metro? A. Yes. 1707

Q. So that it was not the case of the purchase of a single picture on its merits; you were purchasing the entire Metro output? A. Yes.

Q. And you relied a good deal upon the Metro name, didn't you? A. On their performance, yes, and name.

Q. Performance, name and reputation? A. Yes.

Daniel Jaycocks—for Defendants—Cross.

1708 Q. You knew they were very good pickers of material?

A. Yes.

Q. And that included literary material as well as other things? A. Yes.

Q. And you relied more upon their name and reputation and their ability to produce good material than you did upon the reputation of the stars, didn't you? A. No.

Q. You take Crawford, for instance, did you know, in that very year she had a failure? A. I knew for many years she had been an outstanding box office attraction.

Q. Did you know that very year she had a failure? A. I can't remember.

1709 Q. Did you know she did "Rain"? A. I didn't know it was that year.

Q. It was that year 1932, and did you know that "Rain" was a failure? A. It was a pretty good picture.

Q. Did you know it was a failure, a box office failure? A. No, I did not.

Q. For your information, it was a decided one. A. No, I didn't know that.

The Special-Master: Did West Coast have a contract to take Metro pictures extending beyond a year?

1710 Q. You might answer that, Mr. Witness. A. At that time, no.

Q. You limit it; you say "at that time". Was there a time when they did have? A. I believe they now have.

Q. In making the contract for 48 pictures with Metro for that year, it was all done in one contract? A. I don't remember the details. I presume—

Q. I thought you were active in the details?

Mr. Pollak: The answer is not finished.

Daniel Jaycocks—for Defendants—Cross.

A. I presume, as is the usual procedure in contracts of that kind, that we made out delivery sheets for each situation, and attached those delivery sheets to our master contract. 1711

Q. The master contract covers the 48 pictures? A. Covers the procedure under which they are to be played and the delivery of the prints and the payment thereof and all of the legal details.

By the Special Master:

Q. Did they, as a matter of fact, take all the output of Metro-Goldwyn-Mayer? A. Yes.

Q. They must have taken it under a contract, then; it may not have been a continuing contract, but it must have been a contract. 1712

Mr. Pollak: I think he has explained it.

A. Do you want me to review it?

Mr. Pollak: State it in your own way.

A. We take up what we call in our business star delivery sheets, an agreement for one theatre to play 48 pictures for certain terms. We attach each one of those delivery sheets to a master agreement—what we call a master agreement, or the original contract which covers all of the ramifications in connection with the delivery of prints, the payment for them, the damage to prints, and all the other rules in connection with the delivery to the exhibitor. 1713

Q. The net result of that was that West Coast had an obligation to take the output of Metro-Goldwyn-Mayer for that year, good or bad, whatever it was? A. That is right.

Mr. Driscoll: That is all.

MICRO CARD

TRADE

MARK



22

39



1413

65



Daniel Jaycocks—for Defendants—Re-direct.

1714 Re-direct examination by Mr. Pollak:

Q. Mr. Jaycocks, were you obligated by your agreement to take 48 pictures, you did not wish to?

Mr. Driscoll: Objected to as not the best evidence; the contract itself is the best evidence.

Q. Where is the contract? A. The contract, I presume, is out in California today.

Q. Now I repeat my question.

1715 Mr. Driscoll: I repeat my objection.

The Special Master: Objection sustained.

Mr. Pollak: The best evidence rule, as I understand it, is not applicable where the document is out of the country, the jurisdiction.

The Special Master: I don't think you ought to do that, Mr. Pollak. I think, Mr. Pollak, if you want to make any point of that you ought to prove it in a different way than by this witness.

Mr. Pollak: Mr. Driscoll started this inquiry, if your Honor please. The whole thing doesn't seem to be very important.

1716 The Special Master: I think I got a very clear categorical answer to my question. As a practical matter West Coast took all the production of M-G-M during the year, good, bad or indifferent. If you want to go into the exact contract under which they took it I think you really, in fairness ought to produce the contract. Don't you think that is right?

Mr. Pollak: I think the facts are quite simple and are familiar to Mr. Driscoll who is experienced in this business. As I stated before, I think Mr. Driscoll's position is technically unsound in view of the fact that the document is out of the jurisdiction.

Mr. Driscoll: Only one copy is proven to be at

George P. Skouras—for Defendants—Direct.

the West Coast. There are presumed to be two copies. How can you say that Metro's copy is out at the West Coast?

1717

Mr. Pollak: If you insist upon our producing a copy, we will.

Mr. Driscoll: If you are going to prove those facts, I insist upon my objection on the record.

Mr. Pollak: I wanted simply to show, if your Honor please, that they did not have to purchase all of the 48 pictures if they did not think they were good.

(Witness excused.)

1718

GEORGE P. SKOURAS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your name? A. George P. Skouras.

Q. What is your present occupation? A. President of Skouras Theatres Corporation.

Q. Which exhibits motion pictures? A. Yes, sir.

Q. How long have you been in the motion picture industry? A. Twenty years.

1719

Q. Were you in that industry in 1932? A. Yes, sir.

Q. What were you doing in 1932? A. I was president of the same corporation.

Q. You are not now connected with M-G-M in any way? A. I was never connected with them.

Q. Or with Loew's? A. No, sir.

Q. Mr. Skouras, take a picture not bearing a name of or identified with any well known story or novel, produced by M-G-M Company, with Thalberg as supervisory producer, with Stromberg as producer in immediate charge of produc-

George P. Skouras—for Defendants—Direct.

1720 tion, with Brown as director, with Joan Crawford and Robert Montgomery as stars, what proportion of the gross receipts of the picture would you say was ascribable to the stars?

Mr. Driscoll: I object to that on the ground that there is no basis for it; incompetent, irrelevant and immaterial.

The Special Master: You haven't established the basis for it.

1721 Q. Just a moment, Mr. Skouras, before answering that question. Are you familiar with the position that Joan Crawford held in the movie world in 1932? A. Yes.

Q. What was that? A. She was one of the top stars.

Q. Are you familiar with the position that Mr. Robert Montgomery occupied in the movie world at that time? A. Yes.

Q. What was that? A. He was one of the top stars in the movies.

Q. Are you familiar with the position Mr. Thalberg held in the industry in 1932? A. Yes.

Q. What was that position? A. He was considered the best in the business.

1722 Q. Are you familiar with the position that Mr. Stromberg held? A. Yes.

Q. What was that position? A. As one of the leading directors and producers in the business.

Q. Are you familiar with the general reputation of M-G-M as a producing company in 1932? A. Yes, I am.

Q. What was that position? A. They are the best in the business for the last five years, seven years.

Q. Including 1932? A. Yes.

Q. How about Mr. Brown, Clarence Brown, the director? A. I have great respect for his ability. He has always held a high position as director.

George P. Skouras—for Defendants—Direct.

Mr. Pollak: Now, please repeat the question 1723 which Mr. Driscoll objected to.

Q. (The preceding question was read as follows: "Mr. Skouras, take a picture not bearing the name of or identified with any well known story or novel, produced by M-G-M Company, with Thalberg as supervisory producer, with Stromberg as producer in immediate charge of production, with Brown as director, with Joan Crawford and Robert Montgomery as stars, what proportion of the gross receipts of the picture would you say was ascribable to the stars?")

Mr. Driscoll: Same objection.

1724

The Special Master: Same ruling. You may answer.

A. I would give a very small percentage, about five or seven per cent. if the stars were not in, if the director was not in the picture—without any story at all? I believe I did not understand the question.

Q. What proportion would you say was ascribable to the stars? A. If a picture was produced by these people?

Q. Yes. A. I would say about 90 per cent. was in the stars.

Q. Ascribable to the stars? A. Yes.

1725

Q. And the remaining ten per cent was ascribable to the other factors? A. Mr. Pollak, a star combined together with a good leading man, with a director the kind Mr. Brown is, with Thalberg and Stromberg producers altogether, make a great selling argument for the public and a great box office value. If they had a good story with it it makes it that much better. If they have a bad story all the box office goes to these other factors.

Q. What do you mean by a good story? A. By a good story I mean a well known book or a famous play.

George P. Skouras—for Defendants—Direct.

1726

Q. Could you give us examples of that? A. Take a story that will make a great picture, is "Gone With the Wind"; a play, "Tovarich" I think will make a great box office.

Q. In other words; by a good story or play you mean a story or play already bearing a distinguished name? A. That is right; they are big sellers as books or big box office as plays.

1727

Q. Now, this will sound almost exactly like the question I have put, but listen to it attentively and you will see there is a change. Take a picture not bearing a name or identified with any well known literary work, produced by M-G-M, with Thalberg as supervisory producer, with Stromberg in immediate charge of production, with Brown as director, with Crawford and Montgomery as stars, how much of the gross receipts would you say was ascribable to the story, at the outside?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, no basis for it, not within the issues referred to the Special Master for trial, not within any issue that has been raised here in this accounting.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

The Special Master: You may answer.

1728

A. I believe that the story itself is of no value without these people.

Q. With those people what would you say was its attraction in the aggregate?

Mr. Driscoll: Objected to as leading.

The Special Master: Objection sustained. He has answered.

Mr. Pollak: I will put the original question.

The Special Master: I think he has answered. He understood your question.

George P. Skouras—for Defendants—Direct.

Q. How many theatres, by the way, is your company operating? A. 54 theatres. 1729

Q. What was the number in 1932, if you remember? A. 50 theatres.

Q. About the same? A. Yes.

Q. Now, did you personally have to do with the purchase of the picture "Letty Lynton" for those theatres in 1932?

A. I did.

Q. Will you tell us what were the considerations that were in your mind in purchasing that picture, with Joan Crawford as star?

Mr. Driscoll: I object to the question as immaterial, and I object to it as leading, and on the further ground that it is not within the issues referred to the Special Master or any issue raised in this accounting. 1730

The Special Master: Why?

Mr. Driscoll: Because he suggested to him that Joan Crawford was the star and that is why he purchased the picture.

(The pending question was read by the stenographer.)

The Special Master: Cut out, "with Joan Crawford as star". Same ruling and exception.

Mr. Pollak: Now, read the same question without, "with Joan Crawford as star". 1731

Mr. Driscoll: If the witness does not know what is expected of him now—

Q. (The pending question was read by the stenographer, omitting the words, "with Joan Crawford as star".) Will you tell us what were the considerations that were in your mind in purchasing that picture "Letty Lynton"? A. The stars, the director, and the producers.

George P. Skouras—For Defendants—Cross.

1732

The Special Master: Well, let me ask that question I asked before. Did Skouras company have a contract with Metro-Goldwyn-Mayer that they would purchase their output for that year?

The Witness: I don't understand. That I would purchase in advance?

The Special Master: That you would buy the output of Metro-Goldwyn-Mayer that year?

The Witness: We did.

Q. Where, physically, is your contract for 1932 with M-G-M, Mr. Skouras? A. I believe, if it is not destroyed already, it is here in my office.

1733

Q. In what City? A. In New York City.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. As a matter of fact, Mr. Skouras, there are a great many things that cause people to go to a motion picture show, aren't there? A. But mainly to see the pictures.

Q. Some of them, however, go in because it is air-conditioned, as a matter of fact? A. No.

1734

Q. You never heard of any of those? A. I don't believe, if you have a theatre without pictures, anybody will go in. I am sorry to disagree with you.

Q. Let us assume that they go into the theatre to see pictures. There are many elements that attract the patrons into that theatre? A. Whether the weather is bad or good.

Q. Does the weather make any difference? A. In the particular seasons, yes; in winter time when snow is on the ground people who want to go to theatres do not go because of the inconvenience. In the summer time when the weather is hot people prefer to go to the beaches to swim; they don't go to the movies.

George P. Skouras—for Defendants—Cross.

Q. So the weather makes a difference? A. Yes, in the two seasons. 1735

Q. Did you ever hear of a case where the patron is attracted to the performance or the showing of a picture simply because certain stars appear on the marquee of the theatre? A. Have I ever heard of a case?

Q. Yes. A. Without stars there wouldn't be any business; without stars and personalities there wouldn't be any business.

Q. As a matter of fact, patrons frequently go into a theatre without knowing what is showing at all, except a certain star is showing? A. Most of the patrons are well informed, either by newspapers or by previous previews when they were in the theatre before. 1736

Q. As a matter of fact, aren't there certain patrons that go regularly on certain nights every week to the theatres? A. No; I am sorry to tell you that time has gone.

Q. That has gone? A. Yes. We used to have nights when our customers came regularly, but since the talking pictures that is eliminated.

Q. You haven't any of those now? A. That is my experience.

Q. They don't exist? A. I don't think they exist.

Q. If a person goes to see Clark Gable, that person goes to the theatre; if the story is not one that the person likes, does that affect the business of that particular feature? 1737

A. The admirers of Clark Gable are going to see that picture. After they see the picture they are going to express their objections to that story, but they go to see the picture.

Q. Then, isn't the effect of that that they go out and see their friends and tell them that the picture is lousy? A. Sometimes it hurts.

Q. It only hurts sometimes? A. Sometimes.

Q. So that it doesn't make a difference always whether the picture gets the name of being lousy or not? A. If a

George P. Skouras—for Defendants—Cross.

star is outstanding and is on top, I see very very little difference it makes.

Q. Does it make any difference what reputation the picture gets? A. The reputation that a picture gets that has a star like Gable, unless he is on the downgrade period and he is losing out on his popularity, it will make very little difference.

Q. It wouldn't make any difference to have the reputation get around that it is not a good picture? A. I don't know of stars like Crawford that go in bad pictures.

Q. Isn't it a fact that in 1932 Joan Crawford had a failure? A. I don't know of it.

Q. Did you see Joan Crawford in "Rain"? A. I did not.

Q. Do you know how much business "Rain" did, in 1932? A. I couldn't tell you.

Q. And "Rain" was one of the outstanding shows produced on the stage some few years prior to that? A. Yes.

Q. Jeanne Eagles had appeared as the star in it? A. Yes.

Q. And it had had a very long run? A. Yes.

Q. And it had played on the road? A. Yes.

Q. It had a good reputation? A. Yes.

Q. Do you still say it doesn't make any difference whether it is a good story, if the star is outstanding? A. May I answer your question about "Rain"? "Rain" was not practical for pictures; it should never have been made. It was not a subject for movies.

Q. If the literary material does not make any difference, what difference did it make in "Rain"? A. Because a famous book or famous play has the same difference; when it is good it is very popular with movies, and when it is itself bad it brings the opposite result.

Q. So that literary material and reputation of literary material does make a difference? A. If it is well known.

Q. It only makes a difference if it is well known? A. Yes.

George P. Skouras—for Defendants—Cross.

Q. If it is not well known it does not make any difference at all? A. That is right. 1741

Q. So that if you went to a showing of a motion picture and you found a story—I won't say "you" I withdraw that question. Is it your testimony that a patron coming into your theatre to see an outstanding star who finds a story that is disconnected and very bad in every respect, that that makes no difference whatever in the reputation of the picture star? A. I don't get your question. If that picture is disconnected, doesn't make any head or tail, of course people go out and say there is no use to see this star because the picture is absolutely worthless.

Q. When you answered these hypothetical questions put to you by Mr. Pollak, you have taken into consideration all you have stated to me, that no outstanding star has been put into a picture of that kind? A. Taking into consideration that no outstanding star has ever been put into a disconnected, absolutely worthless to review picture. 1742

Q. You are also taking into consideration certain other facts and knowledge of the business acquired by you over that twenty years' experience? A. I am always speaking from my experience.

Q. You took those things into consideration when you answered that question, facts that did not appear in the question, gained from your experience? A. Yes. 1743

Mr. Driscoll: I move to strike out the answer, because he took into consideration things that did not appear on the record at all. I move to strike it out. He may not take into consideration anything that is not in the hypothetical question.

Mr. Pollak: All expert questions test the knowledge of the witness.

Mr. Driscoll: He may not take into consideration any single fact that has not been elicited. He has testified that he has taken his experience as a basis.

Colloquy of Counsel.

1744

He has taken as a fact that no star, according to the witness, has ever been put into a picture of that sort, that is, a disconnected worthless picture; he took that into consideration.

Mr. Pollak: He has answered the hypothetical question, your hypothetical question.

Mr. Driscoll: I just want my objection on the record, that the question and answer is improper under the circumstances. You can't have a hypothetical question answered that is not confined strictly to the facts set forth in that hypothesis. And once a witness admits that he has taken into consideration facts outside of the question it is improper.

1745

Mr. Pollak: If your Honor please, the witness has to give the answer within the limitations of the question. He has, however, in giving the answer not only the right but the duty, being an expert, to formulate his answer pursuant to his general knowledge of the field in which he is an expert. If a single specific fact color the answer, as for instance the assumed fact, just hypothetically, that there was some other star in the production not mentioned in the question, if such a fact entered into the reply then a different question would arise. There is not the least suggestion that any such specific fact entered into his reply. I submit it would be clear error to strike out his testimony.

1746

The Special Master: What is Mr. Driscoll moving to strike out; the questions that he asked?

Mr. Driscoll: No, the hypothetical questions asked by Mr. Pollak.

The Special Master: I think Mr. Driscoll is technically right.

Mr. Pollak: He is not, in my opinion. The witness has not said he took anything into con-

George P. Skouras—for Defendants—Cross.

sideration except his general knowledge of the movie business. 1747

The Special Master: He said that he knew that there had never been a picture which was an absolute flop from the standpoint of literary character, produced with any outstanding stars.

Mr. Pollak: If your Honor please, what has that to do with it? He is asked by my question to consider simply the fact that it is a picture, not bearing the name of any well-known play or story. Mr. Driscoll tries to oppose his conclusion by pointing out, if it is a fact, that there might be hypothetically as Mr. Driscoll agrees, and only hypothetically, cases in which there is a miserable story. Even Mr. Driscoll's hypothetical question does not in the least invalidate the answer that has been given, nor as showing, if it be a fact, that "Rain" was a failure; no witness has testified that every production with a star is a success and my question does not assume that it is a success. My question is, what proportion of the receipts, whether it is a success or a failure, is ascribable to the star? Take "Rain", for instance, there is no surety that 90 per cent. of the receipts were not due to Joan Crawford. It might have been a much more egregious failure without her being in it. 1748

The Special Master: I don't think it serves to discuss this any further. I will overrule the objection, with exception to Mr. Driscoll. Any further questions? 1749

By Mr. Driscoll:

Q. Mr. Skouras, did you buy shorts that year from Metro, too? A. Yes.

Q. Do you recall how many shorts you bought? A. No.

Q. Would it run into 20 or 30? A. More.

George P. Skouras—for Defendants—Cross.

750

Q. Would it be a hundred? A. About 50. I say that because I usually buy that amount.

Q. Those were bought on the same contract with the others? A. Not in the same time, not simultaneously. We make a deal for the features first, and then shorts.

By the Special Master:

Q. Mr. Skouras, you are not a producer, are you? A. I am not.

751

The Special Master: The impression I get from this testimony is that distributors come here and they, generally speaking, buy the product of these big movie producers.

Mr. Pollak: You mean the exhibitors?

The Special Master: Yes, exhibitors. That is their business. They are not at all concerned in the production of these pictures.

Mr. Pollak: I think that is right. They are concerned with the general reputation of the company, of course.

752

Q. They play the ones that are generally the winners; is that right, Mr. Skouras? A. We are concerned with the price we pay for those pictures. The stars, the directors, the producer, are all concerned in the price we pay. We pay different prices for different producers.

By Mr. Pollak:

Q. And you pay different prices for different productions of the same producer? A. That is right, much different prices.

Q. Are those prices largely governed by the stars in a given production? A. Yes.

George P. Skouras—for Defendants—Cross.

Mr. Driscoll: I object to the form of the question, as leading. 1753

The Special Master: Overruled.

Mr. Driscoll: Exception.

Q. Mr. Skouras, are the prices of the productions which you take from a given producer affected by the presence or absence of stars in a given production? A. Usually they are. As I said before, if a famous book—

The Special Master: Mr. Pollak, really Mr. Driscoll is beginning to object on the ground of leading. You are asking him what considerations he had in mind. 1754

Mr. Pollak: I think the question "affected by the presence or absence"—

The Special Master: That is leading.

Q. What considerations do you have in mind in determining the price for a particular production? A. Metro-Goldwyn Company comes this year to sell us pictures. We find out first what pictures have the best stars, the best directors, and those are the pictures which usually we buy and pay the highest prices. The pictures which have not got outstanding stars or they are not directed by outstanding directors or produced by outstanding producers we pay the lesser prices. 1755

By Mr. Driscoll:

Q. You take in the case of "Gone With the Wind" that you mentioned here a short time ago. The name of "Gone With the Wind" would receive serious consideration by you, wouldn't it? A. Yes, regardless of the stars.

Q. You would buy that on the name of the book? A. Yes.

George F. Skouras—for Defendants—Re-direct

1756 Q. Now, as a matter of fact, any name that has today sufficient favorable publicity, whether it is the name of a literary product, the name of an actor, the name of a director, the name of a company or the name of the theatre itself, is of value in producing box office, isn't it? A. I don't know of any theatre making a success without pictures; I don't know of any.

Q. You mean, you can't expect— A. I mean, a certain amount of showmanship on the part of the theatre manager to continue to satisfy the customers is always attractive, and but I think the pictures and the box office that they have make the difference between success or failure of a theatre.

1757 Q. All of the elements are important, aren't they, Mr. Skouras? A. It is important to operate the theatre properly.

Q. Aren't all the elements important, the literary material, the management of the theatre, all of those things are what make the success of a theatre, aren't they? A. Mr. Driscoll, all of the elements have a value.

Q. They all have a value? A. Yes.

Q. Of course they have. Then when they pay \$200,000 for "Gone With the Wind" they pay it because they think it has that value? A. Yes.

Q. And when they pay \$160,000 for "Dinner at Eight", they pay it because they think it has that value? A. Yes.

1758 Q. And they wouldn't pay it if they did not think it had that value? A. That is right.

Mr. Driscoll: That is all.

By Mr. Pollak:

Q. Mr. Skouras, take even a book with a famous name, like "Gone With the Wind", in that instance would it make a difference in box office value if some very famous

George P. Skouras—for Defendant—Re-direct.

star or stars, for example, Clark Gable or Greta Garbo, 1759
appeared in it? A. It guarantees success.

Mr. Pollak: That is all.

By Mr. Driscoll:

Q. "Birth of a Nation" was one of the outstanding motion pictures of all time, wasn't it, Mr. Skouras? A. Yes.

Q. And "Birth of a Nation" did not have any big star in it; it had featured players. It was the first epic that was produced in the motion picture industry; it was popularized for months before it was released or even produced. The public was excited and waiting for it. I don't think 1760
there can be any comparison with big pictures like "Birth of a Nation", "The Big Parade", "Ben Hur"; I don't think it makes any difference.

Q. The public remembers those pictures by the name of the pictures and not by the stars that played in them.
A. That is not true.

By Mr. Pollak:

Q. Of those? A. Of those pictures.

Mr. Pollak: May we have a stipulation that the price paid for the motion picture rights of "Gone With the Wind" was \$50,000 or in the neighborhood 1761
of that sum?

Mr. Driscoll: You may have a stipulation that the only information we have is that it was about \$50,000. Beyond that I won't go. And by the same token, my information is that "Room Service" received \$255,000. May we have a stipulation on that?

Mr. Pollak: I don't know anything about that.

John M. Benas—for Defendants—Direct.

1762

Mr. Driscoll: But you are asking for a stipulation as to prices, let us have all of them.

Mr. Pollak: In the question Mr. Driscoll put to Mr. Skouras he assumed something that was not the fact. That is why I want the stipulation.

Mr. Driscoll: "Mie's Irish Rose" sold for \$255,000; "You Can't Take It With You" sold for \$200,000.

1763

Mr. Pollak: Who is testifying now? The point of it is simply this. I wanted to correct a question put on cross examination by Mr. Driscoll. The proper way, if it is the fact, to show these prices is by testimony that they were the prices. Now, I don't happen to know anything about these matters except as to "Gone With the Wind", as to which I have some information, information that Mr. Driscoll presumes. Mr. Driscoll is prepared, in order to avoid bringing in testimony to destroy the assumption of one of his questions, to concede that his assumption is mistaken. The problem has not arisen, except as to the assumption in a question put on cross examination, which was mistaken. I understand it was in this instance; I don't know whether they were in the other instances or not.

1764

JOHN M. BENAS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Benas, what has been your connection in a general way with the movie industry? A. I have been operating and running theatres.

Q. For how long? A. Thirteen years.

John M. Benas—for Defendants—Direct.

Q. Were you doing so in 1932? A. Yes.

1765

Q. Are you connected in any way with M-G-M? A. No.

Q. Or with Loew's? A. No.

Q. And never have been? A. Never have been.

Q. Mr. Benas, how many theatres were you operating in 1932, in the chain you are connected with? A. About ten.

Q. Were you in 1932 familiar with the general reputation of M-G-M in the movie world? A. Yes.

Q. What was that reputation? A. The best in the business.

Q. Were you familiar with the reputation of Mr. Irving Thalberg? A. Yes.

1766

Q. What was that reputation? A. The wizard of the business.

Q. Were you familiar with the reputation of Mr. Stromberg? A. Not as well as with the others.

Q. But you did know about him? A. Yes.

Q. What would you say his reputation was? A. Very good producer.

Q. Were you familiar with the reputation of Mr. Clarence Brown? A. Yes.

Q. What would you say his reputation was? A. First class director, at that time the best director M-G-M had.

Q. Would you also say that you were familiar with the reputation of Mr. Robert Montgomery in 1932? A. Very well.

1767

Q. What was that reputation? A. Good man star.

Q. Were you familiar with the reputation of Miss Joan Crawford in 1932? A. The top star of the business, with the exception of Norma Shearer.

Q. Now, take a motion picture, not bearing a name identified with any well known book or play, produced by M-G-M, with Thalberg as supervisory producer, with Stromberg as producer in immediate charge of production,

John M. Benas—for Defendants—Direct.

1768 with Clarence Brown as director, with Robert Montgomery and Joan Crawford as stars, what proportion of the gross receipts would you say was ascribable to the stars?

Mr. Driscoll: Objected to, as incompetent, irrelevant and immaterial, not bearing on any issue referred to the Special Master for trial and not having to do with any issue that has been raised by this accounting proceeding.

The Special Master: Same ruling.

Mr. Driscoll: Exception. May I assume that my objection goes to this entire examination of this witness, or shall I continue to object to the testimony?

1769

The Special Master: The same objection will be understood to go against all of it. You may answer.

A.: Almost 100 per cent. I would like to answer that question in my own way.

Q. Answer the question in your own way, and give your reasons. A. I am not a big operator like Mr. Skouras. I am not interested in any way. When I buy pictures from Metro, Metro was the only company, until 1936-1937, at which time they changed their policy, which was not selling pictures as the other companies do. When you buy pictures from Paramount or R-K-O you buy the total output. Paramount has been selling us for years their pictures and you don't know who is in. On separate bulletin they tell us you will have Claudette Colbert or Fred MacMurray, but they don't specify. Metro started to do the same thing in the fall of 1936-1937. Prior to that Metro was always selling star series, two Norma Shearer, three Joan Crawford, two Clark Gable, and two Greta Garbo; that was about 1932 to 1936 pictures. At the end they had what they call marquee pictures. In other words they sold us twelve or thirteen marquee pictures, small pictures.

1770

John M. Benas—for Defendants—Direct.

Now, I as an exhibitor was buying their output on account of the 1932 to 1936 star series. I was not interested in the marquee pictures. I was willing to give them back to them as a present. I show you how they were selling. Two Norma Shearer, they had put a number, 201, 202; three Joan Crawford, No. 203, 204, 205; three Clark Gable, 6, 7, 8—they never gave us picture names or anything else, the writers, nothing else, nothing at all; they would give them in a bulletin; probably the same as the others gave us title information, the Metro gave us the stars. We were buying the output on account of the stars. To buy Norma Shearer I didn't know what the Norma Shearer would be called; I wanted the picture that would be with Norma Shearer; that is all I was interested in. If they had in there small pictures, they used to call them marquee pictures, they would be in there. The small players would be in the marquee pictures. But I know Metro was going to give me two Norma Shearers, three Joan Crawford, three Clark Gable, and so on down the line. I wasn't interested in anything else.

Q. Can you give us the considerations that were in your mind in buying the picture "Letty Lynton"? A. I never knew the "Letty Lynton".

Mr. Driscoll: I object to that.

Q. Did you buy it under that name? A. No, I never bought it under that name; I never bought "Letty Lynton".

Q. Mr. Benas, are you familiar with the considerations that operated with other exhibitors of motion pictures?

Mr. Driscoll: In the minds of other motion picture exhibitors? I object that this witness is not qualified to testify what operates in the minds of other individuals.

The Witness: I can; there is a reason for it.

John M. Benas—for Defendants—Direct.

1774

Mr. Driscoll: Objected to. I ask that the witness's statement be stricken from the record.

The Special Master: Just as a preliminary question, why does he think he is competent to answer that?

The Witness: I will answer that.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: We won't pass on his question yet.

Mr. Driscoll: I want to object to it. You have my objection on the record.

1775

By the Special Master:

Q. Tell us why you think you are so competent to tell us what is in other people's minds? A. There are two or three big exhibitors' organizations in the United States in which mostly the small exhibitors like I are members. Warner's, Skouras, Loew's are not members of those organizations. Some of those organizations have as many as 4,000 theatres as members and I am very active in those organizations. I have been for several years head of exhibitor film buying committees, so I am in a position to know how exhibitors buy, not only in New York but in the United States.

1776

Mr. Driscoll: I think on the statement of the witness that it is quite evident that he does not know and that he is not competent to answer. I think on that ground and on all the grounds given before he should not be permitted to answer.

Mr. Pollak: It is exactly the way testimony as to a condition is proved. I can get authority on it right in the Federal Court. The witness has now testified that he belongs to organizations concerned

John M. Benius--for Defendants--Direct.

with these matters and is active in those organiza- 1777
tions.

The Witness: Chairman of the film buying committee.

The Special Master: But that does not mean that he knows just exactly how X, Y and Z buy their pictures.

Mr. Pollak: He can testify whether or not it is a general practice common to many theatres.

Mr. Driscoll: I still submit that he cannot testify as to what acts on the minds of other exhibitors.

Mr. Pollak: I think the Master should receive the evidence, as the effect of excluding it would be to prevent presenting it to the Court. I think the evidence is important and should be received. 1778

Mr. Driscoll: I think it is not important and should not be received. I think too much of that type of evidence has been given here.

The Special Master: I think if you want to bring on some other witnesses here to testify that they do business exactly the way this witness described, all right; but I do not think I will let this witness go into a discussion as to how other people do business.

Mr. Pollak: You might let him testify whether or not the practice he has described is general in the trade, without mentioning any individual cases. 1779

The Special Master: You say, "generally in the trade"; I don't know; I don't think that is good testimony. I don't see how any witness can testify that considerations that operated in his mind in matters of this sort were in the minds of other people.

By Mr. Pollak:

Q. Have you discussed it with other individuals in the exhibiting industry?

Colloquy of Counsel.

1780

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; hearsay.

The Special Master: I don't think it is the best evidence of what is in the minds of the other people.

Mr. Pollak: There is no other way; otherwise we will have to call hundreds or thousands of them.

The Special Master: I don't think that is the way to prove this. You have just had another witness testify, who is a large purchaser of film; he testified practically contrary to this witness.

Mr. Pollak: I don't think he did.

1781

The Special Master: He had an entirely different story.

Mr. Pollak: He said the stars were the dominant consideration, except in the case of a prominent book or play.

The Special Master: This witness testified that he runs a business of ten theatres, and his testimony is very clear as to how he runs those theatres. That is all he can testify to.

Mr. Pollak: You may cross examine.

Mr. Driscoll: No cross examination whatever.

Mr. Pollak: May I make a formal offer of proof?

The Special Master: I can't stop you from making an offer of proof.

1782

Mr. Pollak: The testimony of persons in the motion picture business that the general practice of exhibiting theatres is to buy attractions in prime reliance upon stars appearing in them. That is all I want, really. That is all I want from this witness along that line.

The Special Master: What effect does an offer of proof have?

Mr. Pollak: If it is overruled, it avoids the calling of witnesses, it shortens the proceedings.

The Special Master: I can't stop you from call-

Colloquy of Counsel:

ing witnesses to show how they run their business. 1783

The only objection I have is that the operator of ten theatres has told us just exactly how he buys, very clearly. Mr. Skouras told us how he buys. There was another gentleman here before, Mr. Jaycocks, and he told us how he buys. There are differences in the testimony of each one. Most marked, to my mind, is the difference between the testimony of this witness and Mr. Skouras. I don't see why we should assume that all theatre exhibitors, some with twenty or forty theatres, or five theatres or one theatre, that they are in exactly the same class as these other people and that they are actuated by the same considerations. 1784

Mr. Pollak: I would be surprised if they were. It would reflect upon their testimony if it was so.

The Special Master: That is what you are trying to show.

Mr. Pollak: Not that they are universal in the trade, but that they are common considerations—by expert opinion.

The Special Master: That testimony that you are speaking of I do not think is competent evidence in the case.

Mr. Pollak: Exception.

(Thereupon a recess was taken until two o'clock of the same day.) 1785

AFTER RECESS.

1786

SAMUEL RINZLER, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your residence and occupation? A. Residence, 2015 East Third Street, Brooklyn.

Q. And your occupation? A. Exhibitor, theatre operator.

Q. With what concern are you connected? A. Rand Force Amusement Corporation.

1787 Q. Were you connected with the same concern in 1932?

A. Yes.

Q. What is your position with that concern? A. I am an officer of that corporation, and film buyer.

Q. Which officer are you? A. Vice-President.

Q. Were you an officer in 1932? A. Yes.

Q. That concern operates how many theatres? A. About fifty.

Q. And was the number roughly the same in 1932? A. About the same, with the exception of a few.

Q. You are not connected with the defendants in any way? A. No, sir.

Q. And never have been? A. No, sir.

1788 Q. Mr. Rinzler, are you acquainted, however, with the reputation and standing that M-G-M held in the motion picture world in 1932? A. Yes.

Q. And what was that reputation? A. Foremost position.

Q. Are you familiar with the position that Mr. Irving Thalberg held as a producer in 1932? A. Yes.

Q. What was that position? A. He was about the greatest producer we ever had.

Samuel Rinzler—for Defendants—Direct.

Mr. Driscoll: Assume my objection to all this line of testimony. 1789

The Special Master: Same ruling and exception.

Q. Are you familiar with the position of Mr. Stromberg in 1932? A. I am, yes.

Q. What would you say as to his position? A. He was considered a great producer.

Q. Are you familiar with the position of Mr. Clarence Brown, a director, as it was in 1932? A. Yes; an outstanding director.

Q. Mr. Rinzler, of course you are familiar with the position of Miss Joan Crawford in 1932? A. Yes.

Q. What was that position? A. She was a star then; she is a star now. 1790

Q. Would you like to classify her among stars, in 1932? A. Yes.

Q. What would you say was her position among stars? A. An A star.

Q. Are you familiar with the position of Robert Montgomery in 1932? A. He was a good actor at that time.

Q. Was he known? A. Yes, he was known.

Q. Mr. Rinzler, take a picture, not identified by name with any well-known book or play, produced by M-G-M, under the general supervisory production of Mr. Thalberg, under the immediate production of Mr. Stromberg, with Clarence Brown as director, with Miss Crawford and Mr. Montgomery as stars, what proportion of the gross receipts would you say was ascribable to the stars? 1791

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; objected to as not proper expert testimony, not for expert testimony. I object to it on the ground that it is not within the issues referred to the Special Master for decision here and not within the issues that are raised in the accounting by the defendants.

Samuel Rinzler—for Defendants—Direct.

1792 The Special Master: Same ruling and exception.
Mr. Pollak: You may answer. Perhaps you had better have the question read.

(The pending question was read by the stenographer.)

A. I would say that the stars and the director are at least seventy-five per cent of the receipts; but I am afraid that I do not really understand the question properly, but the stars should be at least seventy-five per cent of the receipts.

Q. And would the remaining twenty-five per cent be spread or split up among the other things? A. Yes.

1793 Q. Including the director, the producers, the general reputation of M-G-M, and the story? A. That is right.

Q. What proportion would you ascribe to the story, of the total gross receipts, with reference to a picture not identified by name with any well known book or play, produced by M-G-M under the general supervisory production of Mr. Thalberg, under the immediate production of Mr. Stromberg, with Clarence Brown as director, and with Miss Crawford and Mr. Montgomery as stars: what portion of the gross receipts, what percentage, would you ascribe to the story?

1794 Mr. Driscoll: Same objection to that question.

The Special Master: Same ruling and exception.

A. I would not give it any more than ten per cent.

Q. Mr. Rinzler, will you tell in your own way what were the considerations that operated in your mind in 1932 in the selection of pictures for exhibition in your theatres?

Mr. Driscoll: Objected, to as immaterial.

The Special Master: Same ruling, and exception.

(The pending question was read by the reporter.)

Samuel Rintzler—for Defendants—Cross.

A. Of course, the stars were the way they sold the pictures at that time, that is, the stars' pictures were always at the top for the larger amounts of money; at the bottom they had the smaller rental value. 1795

Q. Did you exhibit "Letty Lynton", if you know, in your theatres? A. I remember that I did.

Q. Will you tell us the considerations that operated in your mind in selecting "Letty Lynton" for exhibition?

Mr. Driscoll: Objected to as immaterial.

The Special Master: Overruled.

Mr. Driscoll: Exception.

A. I don't think they sold me "Letty Lynton". They sold me two or three Joan Crawford pictures and they were signified by numbers, Joan Crawford No. 1, Joan Crawford No. 2 and Joan Crawford No. 3; maybe there was a fourth one, but I don't remember. That is the way they sold pictures in those days. 1796

Q. Did one of those Joan Crawford pictures afterward turn out to be "Letty Lynton"? A. Yes, sir.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. Mr. Rintzler, it is a fact, is it not, that there are a great many elements that enter into the success or failure of a picture? A. Oh, yes. 1797

Q. And one of those elements is the story, is that right?

A. In a picture your story has a certain element.

Q. You are familiar with "Parnell"? A. Yes.

Q. Who produced "Parnell"? A. M-G-M.

Q. That is generally acknowledged to be a failure? A. Not that I know of.

You hadn't heard about that? A. No.

Nathan J. Blumberg—for Defendants—Direct.

1798 Q. Have you played "Parnell"? A. No, I am waiting for my date.

Q. You have not played it, that is right? A. Yes.

Q. "Parnell" has Gable and Loy? A. Yes.

Q. Two outstanding stars? A. Yes.

Q. You haven't heard it is a failure? A. No.

Q. You consider it one of the big pictures of the year?

A. Absolutely.

Mr. Driscoll: That is all.

1799 NATHAN J. BLUMBERG, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name? A. Nathan J. Blumberg.

Q. What is your residence? A. 50 Central Park West.

Q. And your occupation? A. Vice-President and General Manager of theatre operators, R-K-O Corporation.

Q. What was your business in 1932? A. Same as it is now—no, wait a minute; in charge of the eastern operations of the company.

1800 Q. You have been connected with the motion picture industry how long? A. Twenty-five years.

Q. How many theatres, by the way, does R-K-O operate? A. With their partnerships, about 132.

Q. What was the number, approximately, in 1932? A. They had about 160 at that time.

Q. Mr. Blumberg, are you connected in any way with the defendants? A. The Loew company?

Q. The Loew company or the M-G-M company? A. Not at all.

Nathan J. Blumberg—for Defendants—Direct.

Q. Mr. Blumberg, are you familiar with the position of M-G-M and its reputation from 1932 as a producing company? A. I am. 1801

Q. What would you say that reputation was?

Mr. Driscoll: Same objection I assume stands?

The Special Master: The same objection and the same ruling.

Mr. Driscoll: And exception.

A. They were the outstanding producing company in 1932.

Q. Were you familiar with the reputation that Mr. Irving Thalberg had in 1932? A. I was.

Q. What would you say about that reputation? A. The best producer in the entire motion picture industry. 1802

Q. Are you familiar with the reputation of Mr. Stromberg in 1932? A. I am.

Q. What would you say about that? A. He was one of the outstanding producers.

Q. Are you familiar with the reputation of Mr. Clarence Brown in 1932? A. I am.

Q. What would you say concerning him? A. A very able director.

Q. Are you familiar with the position of Mr. William Montgomery in 1932? A. Robert Montgomery?

Q. Robert Montgomery. A. Yes; I would classify him as an A star in 1932. 1803

Q. Are you familiar with the position of Miss Joan Crawford in 1932? A. I am.

Q. What would you say concerning her position? A. Double A star.

Q. Now, take a picture not bearing a name identified with any famous book or story, produced by M-G-M, with Mr. Thalberg as supervising producer, with Mr. Stromberg as producer in immediate charge of production, with Clarence Brown as director, with Robert Montgomery and

Nathan J. Blumberg—for Defendants—Direct:

1804 Joan Crawford as stars, what proportion of the gross receipts of the picture would you say was ascribable to the stars?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; I object to the form of the question; I object to it on the ground that it is not within any issue that is referred to the Special Master for trial or within any issue that has arisen in connection with the accounting of the defendants in this action.

The Special Master: Same ruling.

1805

Mr. Driscoll: Exception.

Mr. Pollak: You may answer. Do you want the question re read?

The Witness: Yes.

(The pending question was read by the reporter.)

A. Seventy-five per cent. of the gross.

Q. What proportion of the gross receipts, under those conditions, would you say was ascribable to the written material or story?

Mr. Driscoll: Same objection as to that question.

1806

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. Ten or twelve per cent. of the gross.

Q. Mr. Blumberg, did your theatres, the R-K chain, exhibit "Letty Lynton"? A. We did.

Q. In practically all of the 160 or so theatres? A. No; I would say in about 30 per cent of our theatres. There were certain territories we did not have the Metro product.

Q. Did you have to do with the booking of that picture? A. The booking of it? Yes.

Nathan J. Blumberg—for Defendants—Direct.

By the Special Master:

1807

Q. What do you mean by the booking? A. The buying or the booking? Are you confining the question to the booking, I mean?

By Mr. Pollak:

Q. The buying. A. The buying, yes.

Q. You had to do with the buying? A. Yes.

Q. Would you state what considerations were in your mind in buying the picture "Letty Lynton"?

Mr. Driscoll: Objected to as immaterial.

1808

The Special Master: I think you had better let him tell anything he can about the purchase of it.

Q. Will you please tell us in a general way your recollection of the purchase in 1932 of "Letty Lynton", in your own way? A. I did not buy "Letty Lynton". I bought a Joan Crawford-Robert Montgomery picture under a number. "Letty Lynton" never even entered into any consideration so far as the buy was concerned. It was just a number. The name came later. Any terms that we paid for that picture was based upon Montgomery and Crawford.

By the Special Master:

1809

Q. At that time were you purchasing the Metro-Goldwyn-Mayer output for that particular district that you operated? A. Yes; we all sat in on the buy at that time.

By Mr. Pollak:

Q. By what considerations would the price that you pay for any particular picture be determined?

Nathan J. Blumberg—for Defendants—Cross.

1810

Mr. Driscoll: Objected to; no foundation laid for it. He did not testify that he bought a particular picture; he bought the output.

Q. Was there a price for the different pictures in the output?

Mr. Driscoll: Objected to.

A. They were priced.

Q. Will you tell us what considerations determined the prices that you were willing to pay for a particular picture?

1811

A. The star value; the percentage of that picture was based upon the fact that we were buying a Crawford and Montgomery picture.

Cross examination by Mr. Driscoll:

Q. Did your contract cover a number of pictures? A. Yes.

Q. How many? A. Offhand I don't remember; it was the entire output; probably with some eliminations.

Q. Some 40 pictures, possibly? A. Possibly forty.

Q. Some of those were percentage pictures? A. Yes.

1812

Q. Were the percentage pictures designated in advance, or were they designated afterwards? A. Offhand I don't know; I would have to look at the contract.

Q. Your contract would show all that? A. Yes; our contract would show all that.

Q. Is it not a fact, Mr. Blumberg, that when they start to make a picture with a star, the bigger the star the better they try to make the picture? A. Yes.

Q. They usually try to give their leading directors to the leading stars? A. Yes.

Q. And they try to get the best material they can, the best books, the best stories they can, for them? A. Yes.

Q. And try to give them the best sets they can? A. Yes.

Nathan J. Blumberg—for Defendants—Cross.

Q. So that taken as a whole, when they start in to make a picture with a star, they try to give it the very best they can, story, direction, scenario, costumes and all? A. That is correct. 1813

Q. So that when you are buying a picture of a leading star you expect all those things as part of that picture? A. We hope to.

Q. You expect it, isn't that so? A. Yes, we expect it and hope that it will come true.

Q. When did you first learn that you were going to be a witness in this case, Mr. Blumberg? A. I think about three or four weeks ago.

Q. Who asked you to testify? A. Mr. Cohen called me. 1814

Q. Did he tell you what you were going to testify to?

A. No. He asked me if I would be available to come down here. I said I was leaving for the Coast but when I would return I would be very happy to come down.

Q. You didn't have any idea of what you were going to be called upon to testify to? A. Not until the little conversation I had with Mr. Pollak in the other room.

Q. Did he tell you that he was going to ask you these questions? A. Yes.

Q. About the percentage you would allocate to the stars?

A. Yes.

Q. And the percentage you would allocate to the story?

A. No. 1815

Q. Did he tell you what the other witnesses had testified?

A. No, he did not.

Q. Can you tell me whether or not you played "Lettie Lynton" on a percentage basis? A. No, offhand I couldn't tell you that. I imagine we did because it was one of the top pictures.

Q. You do business with Metro now? A. We do, yes.

Q. You buy their product in a great many situations? A. Yes, we do.

Mr. Driscoll: That is all.

Nathan J. Blumberg - for Defendants - Re-direct.

1816 Re-direct examination by Mr. Pollak:

Q. Mr. Blumberg, in one small respect I would like to correct you, if I may, with regard to the conversation that you and I had. I think you testified that I had not told you what the fractions or percentages that other witnesses had ascribed were. A. That is correct.

Q. I think after you had said 75 I said that other witnesses had given the same percentage that you ascribed. A. I don't recall that.

Q. Or don't you recall that? A. No.

Q. Will you explain what you mean when you said that your contract had certain eliminations in it?

1817

Mr. Driscoll: He did not say that.

Mr. Pollak: Yes, he did. This is clarifying what you brought out on cross examination.

Mr. Driscoll: Will you permit me to finish my objection. I object to that; I object to the question on the ground that it is not the best evidence of what the contract provides.

Mr. Pollak: This is in reply, sir, to what has been brought out on cross examination.

The Special Master: I don't remember the witness's saying anything about elimination.

1818

Mr. Pollak: As I recall it, he did so testify. (To stenographer.) Would you read the third or fourth question and answer on cross examination?

(The following questions and answers, appearing at page 903 of the minutes, were read by the stenographer:

"Question: Did your contract cover a number of pictures? Answer: Yes.

"Question: How many? Answer: Off hand I don't remember; it was the entire output, probably with some eliminations."

Nathan J. Blumberg—for Defendants—Re-direct.

Mr. Driscoll: That is the entire testimony of the witness. My opponent insists that if the witness uses a word the entire parole rule of evidence is thrown out of the window. I submit that is not so. If they want to show the contents of that instrument they should bring it here. 1819

The Special Master: What about the idea that you delved into this contract?

Mr. Driscoll: I have not delved into the contract. I am not asking him about the terms of the contract. I am asking him for certain direct information. I have a right to do that. They want to prove the contents of the contract. I can go into the terms of the contract on cross examination without putting it into evidence. But when they want to take advantage of that to prove the instrument, it is a violation of the rule of parole evidence. 1820

The Special Master: What do you say to that?

Mr. Pollak: In the first instance, Mr. Driscoll's evidence, whether they bought the entire output, obviously opened the door as to the agreement whereby it was bought. It would have to be bought by some agreement. Secondly, I say that the parole evidence rule, which alone Mr. Driscoll has cited, is absolutely inapplicable except between the parties to a contract in a litigation between the parties to a contract. Thirdly, I say that neither the parole evidence rule nor the best evidence rule can be applicable to an issue which on its face is one of elimination, that is on its face an issue as to matters not in a contract but excluded from it. 1821

The Special Master: What is the question?

Mr. Pollak: What he means by "elimination". First, I will put this simple question.

Louis Notarius—for Defendants—Direct.

1822

Q. Mr. Blumberg, what do you mean by "elimination"?

A. Why, all companies' pictures that we contract for, we always have what we call an elimination clause, which gives anyone the right to select ~~any~~ ^{from} percent. of the product up to 100 per cent., sometimes lower than that.

The Special Master: As a practical matter, they purchased this picture, didn't they?

Mr. Pollak: Yes, and a great many others.

The Special Master: I don't see that it is very important. Let it go at that.

Mr. Pollak: I will just get this in—

4823

The Special Master: I don't want to get in a lot of stuff about this contract without putting it in evidence.

Mr. Pollak: Would it be possible to get in a definition of "elimination"?

The Special Master: No, I don't think so.

Mr. Pollak: All right. That is all.

LOUIS NOTARIUS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

1824

Direct examination by Mr. Pollak:

Q. What is your full name? A. Louis Notarius.

Q. Residence? A. 2544 Valentine Avenue, New York City.

Q. Occupation? A. I am broker and reviewer for the Paramount organization.

Q. What was your occupation in 1932? A. Practically the same thing.

Q. How long have you been connected with the motion

Louis Notarius—for Defendants—Direct.

picture industry? A. I started with Paramount in 1924; 1825
it was the first organization I worked with in the moving
picture industry.

Q. You have never been connected with any of the de-
fendants in any way? A. No, sir.

Q. Mr. Notarius, are you familiar with the position that
M-G-M held in the motion picture world in 1932? Just
answer yes or no. A. Yes, I am.

Q. What would you say that position was? A. Well,
it was the outstanding position in the industry in 1932.

Q. Are you familiar with the reputation of Mr. Thal-
berg at that time? A. Yes.

Q. What was his reputation? A. He had a very fine 1826
reputation; he was one of the foremost producers in the
business.

Q. And Mr. Stromberg? A. The same thing.

Q. And Mr. Clarence Brown? A. He was always con-
sidered a fine director.

Q. And Mr. Robert Montgomery? A. Well, he was a
good leading actor.

Q. And Miss Joan Crawford? A. Joan Crawford was
a leading female star of the time.

Q. Now, take a picture produced by M-G-M, with Thal-
berg as supervising producer, with Stromberg in imme-
diate charge of production, with Clarence Brown as
director, with Joan Crawford and Robert Montgomery 1827
as actors and stars, the picture not bearing the name of
any well known book or play, what proportion of the
gross receipts would you say was ascribable to the stars?

o Mr. Driscoll: That is objected to. It is objected
to as to form, calling for a conclusion. I object to
it on the ground that it is incompetent, irrelevant
and immaterial, not within any of the issues re-
ferred to the Special Master for hearing or any

Louis Notarius—[for Defendants—Direct.

of the issues that have been raised by the accounts of the defendants in this action.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer. Do you want the question read to you?

A. I think I know what the question is. I have heard it several times. I am inclined to believe that all combined, the stars, director and producers, should receive 90 per cent. of the credit at least.

Q. By the credit you mean 90 per cent. of the gross receipts? A. That would be the drawing power of the picture.

Q. How many theatres were in your chain in 1932, Mr. Notarius? A. Well, I handled personally about forty theatres. However, I had contact with theatres throughout the country in that I advised them of the caliber of pictures and so on; I was in contact with them in that way, which consist of over a thousand theatres.

Q. Did those theatres or some of them, I ask first of the forty, exhibit "Letty Lynton"? A. Yes.

Q. Did some of the thousand exhibit "Letty Lynton"? A. Some of the thousand? Yes.

Q. Do you happen to know about how many of the forty exhibited "Letty Lynton"? A. I couldn't say that off hand; after all, it happened four or five years ago, but I imagine every first run situation in every town played "Letty Lynton".

Q. And that applies also among the thousand, is that right? A. Yes. I want to explain something with reference to that. You may have a thousand theatres; however you can only play "Letty Lynton" in one theatre in a situation. A situation may consist of five or six theatres, so that you will only be able to play that first run in one theatre out of those six in a particular town. While

Louis Notarius—for Defendants—Direct.

you may have a thousand theatres, you may perhaps only play the picture in 30 per cent. 1831

Q. That is the point. A town, for illustration, has about six thousand people. You would exhibit the picture in only one theatre; is that right? A. That is right.

Mr. Driscoll: It would not be confined to a town of 6,000. It might be the same in a town of 60,000. You should let the witness testify.

Q. In a given area with a limited population, a single exhibition is all that that area and population will stand? Is that the point? A. Not exactly. If you limit me to population, I can't answer yes or no. 1832

Q. You tell it in your own way. A. However, in small situations the picture will usually only play once in a theatre. In a larger situation, say in a town that has a population of 60,000 people, you may have a first, second and third run, and the picture will get three runs in the particular town, depending on the drawing power in the town.

Q. Now, will you tell us in your own way what were the considerations that operated in your mind in the selection of pictures for exhibition, in 1932?

Mr. Driscoll: Objected to on the ground that the mental considerations of this witness are not material to the issues being tried here before the Special Master. 1833

The Special Master: Did this witness testify that he bought pictures?

Mr. Pollak: Yes; that he had to do with it.

The Special Master: Just let him tell how he bought pictures from Metro-Goldwyn; let us keep it down to that.

Mr. Pollak: I withdraw the question.

Louis Notarius—for Defendants—Cross.

1834

Q. How did you buy pictures from Metro-Goldwyn? A. With Metro-Goldwyn we bought pictures on the basis of star values.

Q. That was true in 1932? A. Yes, sir.

The Special Master: Did this witness testify that he ran the theatres of the Paramount?

The Witness: I did not run the theatres. I help buy, book and review the pictures.

Q. For the Paramount chain? A. For the Paramount theatres.

1835

The Special Master: Did you buy the output of M-G-M for the year?

The Witness: For certain situations.

The Special Master: For certain situations as you have described?

The Witness: Yes.

Q. Would you explain what you mean by "star values", Mr. Notarius? A. Any picture in which there is a personality upon which the theatre depends for its drawing power—

Q. —has star value, is that right? A. —that is the star value in the picture.

1836

Q. Would you say that Joan Crawford had star value in 1932? A. Definitely.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. There is considerable difference between buying and booking, isn't there, Mr. Notarius? A. Well, while in the physical operation the procedure is different, but I think they are both intertwined. You can't tell one from the other.

Louis Notarius—for Defendants—Re-direct.

Mr. Driscoll: Will you read the answer?

1837

(The preceding answer was read by the reporter.)

The Witness: I didn't say you can't tell one from the other. You can't very well buy pictures unless you know how to book them. Because you have to know the value of pictures before you can buy them, and in order to know the value you must have experience as a booker.

Mr. Driscoll: I move to strike out the statement of the witness as not responsive to my question. I asked this witness a simple question as to the terms "buying" and "booking".

The Special Master: Strike it out.

1838

Q. Now, Mr. Notarius, isn't there a difference between buying and booking? Yes or no? A. I say you can't answer that with yes or no. I said they are combined.

The Special Master: You answer yes or no, and he will ask you what is buying and what is booking.

Mr. Pollak: He says that he can't answer yes or no.

Q. Are booking and buying the same thing? A. No.

By Mr. Pollak:

1839

Q. Will you tell us what buying is?

The Special Master: I know what buying is.

Q. Will you tell us what booking is? A. Do you really want me to tell you what that is?

Mr. Driscoll: That is why you were asked.

Mr. Pollak: I think I was asking the question.

Louis Notarius—for Defendants—Re-re-direct.

1840 Q. Mr. Notarius, what is booking? A. Booking is the operation of placing pictures into theatres particularly.

Mr. Pollak: That is all.

By Mr. Driscoll:

Q. As a matter of fact, you buy your pictures on contract just the same as you buy the output of Metro, isn't that correct? A. You buy your pictures on contract?

Q. Yes, you buy the output? A. You buy either the output, or—

Q. Or selected pictures? A. Yes.

1841 Q. At the time you buy them they are not booked? A. No.

Q. The booking is putting in your dates for exhibition at different times? A. Yes.

Q. So that the two things are entirely separate and distinct, buying and booking, isn't that right? A. No, not necessarily.

Q. All right; never mind. A. If you want me to explain it I will.

Mr. Driscoll: I don't want you to explain anything, Mr. Notarius.

1842 The Special Master: I suppose what the witness meant to say was that he would not buy unless he knew where to book them.

The Witness: You have to know that when you buy.

(The witness was thereupon excused.)

Mr. Pollak: May I recall Mr. Notarius?

(The witness resumed the witness chair.)

By Mr. Pollak:

Q. Mr. Notarius, I think you wanted to add something to your testimony?

Lothar Notarius—for Defendants—Re-re-direct.

1843

Mr. Driscoll: I would like to have the record show that after Mr. Notarius quit and left the stand he held a conference with Mr. Cohen and then announced his desire to resume his testimony.

Mr. Pollak: The record may show that.

A. I have no desire to resume the testimony. You are asking me to resume it.

Q. Did you want to explain something about these theatres? A. No, I did not want to explain anything. I told you that one of the functions I performed for the Paramount theatres was to write a review of pictures after seeing them to give the men in the field an idea as to the box office of the picture. I wrote such a review in 1932 about "Letty Lynton".

1844

By Mr. Pollak:

Q. Did that go to your thousand theatres?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; not within the issues being tried here; not within the issues that have been referred to the Special Master for trial; not within any issue that has arisen here on this accounting proceeding.

1845

The Special Master: I think you have gotten the testimony you wanted from your witness anyway.

Q. Approximately how many theatres did that go to?

Mr. Driscoll: I make the same objection to that question. I don't think we are at all interested that he sent out some communication to a thousand theatres.

William Yoost—for Defendants—Direct.

1846

Q. Is the communication in writing? A. It is a short review. I do it for every picture of consequence. I did at that time and we still do it.

Q. Have you got that with you? A. Yes, I have a copy in my pocket. (Producing paper.)

By the Special Master:

Q. Does this refer to "Letty Lynton"? A. Yes.

Mr. Pollak: I offer it in evidence.

1847

Mr. Driscoll: I make the same objection to that as having nothing whatever to do with the issues here.

The Special Master: I am going to let it go in over your objection.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. 26, of this date.)

WILLIAM YOOST, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

1848

Direct examination by Mr. Pollak:

Q. What is your full name? A. William Yoost.

Q. What is your residence? A. 175 Riverside Drive.

Q. And your occupation? A. Theatre owner.

Q. What was your occupation in 1932? A. Theatre owner.

Q. Of what theatres are you the owner, or with what owning company are you connected? A. In 1932 I operated personally seven theatres in Manhattan and was associated with others.

William Yoost—for Defendants—Direct.

Q. Now how many do you operate? A. Directly six 1849
theatres, and associated in many others.

Q. About how many? A. Maybe twenty-five.

Q. Mr. Yoost, how long have you been connected with
the motion picture industry? A. Since 1912.

Q. By the way, are you connected with the defendants
or any of them, Loew's Incorporated or the M-G-M com-
panies? A. No.

Q. Have you ever been? A. No.

Q. Mr. Yoost, are you familiar with the reputation that
M-G-M enjoyed in 1932—just yes or no? A. Yes.

Q. What was that reputation? A. The best in the in-
dustry.

Q. Are you familiar with the reputation of Mr. Thalberg
in 1932? A. Yes. 1850

Q. What was that reputation? A. The highest.

Q. And the reputation of Mr. Stromberg? A. Very good.

Q. And the reputation of Mr. Clarence Brown? A. Good.

Q. And the reputation of Mr. Robert Montgomery? A.
A very good drawing card, a good star.

Q. And the reputation of Miss Joan Crawford? A. At
that time she was the best in the business.

Q. Now, Mr. Yoost, the success of a given motion picture,
I suppose, depends on a number of factors, does it not?
A. It does.

Q. Other things being equal, does the contribution of 1851
the star increase if the star is famous? A. It certainly
does.

Q. Other things being equal, does the contribution of
the story increase if the story by its name is associated
with a famous production? A. It certainly does.

Q. For example, if it bears the name of a famous play?
A. Yes.

Q. Or a famous novel? A. Yes.

Q. And similarly does the contribution become less if
the star is not well known, other things being equal? A.

William Yoost—for Defendants—Direct.

1852. It certainly does. They break stars that way, by giving them a very inferior book or play to do.

Q. And suppose you have a picture without a well known book, does the contribution of the star add to the total?

A. The star is the outstanding value.

Q. Now, take a picture produced by M-G-M; not bearing a name identified with any famous book or story, under the supervisory production of Mr. Thalberg, under the immediate production of Mr. Stromberg, with Clarence Brown as director, with Miss Crawford and Mr. Montgomery as the stars, what proportion of the drawing power would you say was ascribable to the stars?

1853

Mr. Driscoll: I object to the question on the same grounds mentioned before: I object to the form of the question; I object to the question as incompetent, irrelevant and immaterial; not bearing on any issue referred to the Special Master for trial, not within any issue which has been raised upon this accounting proceeding.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: Do you want the question read?

The Witness: If you will.

(The pending question was read by the reporter.)

1854

A. I would say in an instance of that kind, from a ballyhoo or advertising standpoint, we would advertise the star, and I would attribute 95 per cent.—in our type of theatre, where the book or vehicle is not outstanding we would not even mention it; it is the star we advertise.

Q. Mr. Yoost, did any of your theatres exhibit "Letty Lynton" that you recall? A. Yes.

Q. Now, did you personally have to do with the buying of "Letty Lynton"? A. Yes, I buy all of our pictures.

Q. And did in 1932? A. Yes, I did in 1932.

William Voost—for Defendants—Direct.

Q. Will you tell us how you bought "Letty Lynton" in 1855 1932?

Mr. Driscoll: I object to the form of that question. It might call for anything. It is direct examination, not cross examination. It is impossible to see what the answer is going to be or what it is leading to.

The Special Master: Go ahead; tell the circumstances at the time; tell about buying "Letty Lynton".

Mr. Driscoll: I object; and note my exception.

A. I did not buy "Letty Lynton".

1856

By the Special Master:

Q. What did you buy? A. I bought the stars.

Q. Perhaps we can shorten it. Did you take Metro's output? A. The entire output for that year.

Q. And "Letty Lynton" happened to be one of the productions? A. It was not so mentioned. We bought the Joan Crawford; we bought the contract more on the strength that we were getting the Joan Crawford pictures, not a particular vehicle she might appear in. It was the star that interested us.

Q. But you did buy the M-G-M productions for that year? A. We bought the entire output.

1857

By Mr. Pollak:

Q. Did you buy "Letty Lynton" by name? A. No, that would not mean very much to us. It was the star that we bought—in our particular theatres, anyway.

Q. Do you know how the picture was described in the sales bulletin? A. As a Joan Crawford, without the mention of any title.

Mr. Pollak: That is all.

William Yoost—for Defendants—Cross.

1858 Cross examination by Mr. Driscoll:

Q. When you bought the star you knew that she was going to have one of the leading directors? A. Well, the Metro company—

Q. You assumed that she was? A. We take Metro by its reputation. They have for years been the outstanding producing company in the field, and are today.

Q. And now, coming back to my question again, I will ask you to follow my question and see if you can't answer that, without telling me what Metro is or is not. I asked you, when you bought Crawford as the star you expected she was going to have one of the best directors? A. Why,

1859 yes, I would look for that.

Q. As a matter of fact, they give to the best stars the best directors, don't they? A. Not always.

Q. Usually don't they try to? A. I suppose it depends upon the circumstances. I have seen stars made and unmade.

Q. As a matter of fact you have stated that they can break stars by giving them an inferior book or material? A. Yes.

Q. That frequently happens, doesn't it? A. Sometimes.

Q. So that the book is important? A. If they gave her another "Lettie Lynton" they would break Joan Crawford.

1860 Q. You didn't like it? A. No. That is what brought the charges into the field of criticism of their motion pictures; that was a terrible picture.

Q. How about "Rain" that she was in that year, too? A. No, "Rain" didn't do the industry any good.

Q. So that she had two terrible pictures that year? A. From the standpoint of the good of the industry.

Q. Now, to come back to where we started, can you give me an instance where one of the leading stars was given other than a leading director? A. I can't right off the minute; I would have to look it up; if you give me a little time I may pick it up quick.

William Yoost—for Defendants—Cross.

Q. As a matter of fact, don't they try, when they pick a leading star, to furnish that leading star with the best material, the biggest director, the best costumes, the best sets, the best production, they can get for her? A. That has been the Metro's reputation for years.

1861

Q. Isn't that your business, Mr. Yoost? A. That is the business of the producer. What is their business—

Q. —you are not interested in? A. Sometimes much to our sorrow.

Q. You say that is the producer's business, not your business? Is that your testimony; is that what you mean?

A. As far as supplying material.

Q. What is your answer, please? A. As far as supplying material and producing the pictures, that is the producer's problem, not ours. We buy the pictures on reputation. It is a blind book to us, and we expect when we do buy that we get good pictures. We don't always get them.

1862

Q. So that the entire thing is a gamble to the exhibitor?

A. So far as we are concerned, we depend upon stars to pull us out. Out of a group of 48 pictures we might get ten or fifteen percent good pictures, and it is the stars that help us, because it is a terrible proposition.

Q. Out of 48 pictures you get 10 or 15 per cent good pictures; that might be six or seven good pictures? A. Yes, outstanding pictures.

1863

Q. The rest are mediocre or failures? A. Good, bad or indifferent.

Q. And you can't tell anything about it? You take your chances and abide by the results? A. And through ballyhoo we try to put it over.

Q. You build it up all you can? A. We build it up all we can.

Q. Even though you think the picture does not deserve it? A. That is a part of our business which we often have to go into because of our programs.

William Yoost—for Defendants—Cross.

1864

Q. To get them in there? A. Right.

Q. And that is why you have bank nights and double features? A. Yes.

Q. And Screeno and all those things, to get the people into the theatre? A. Yes.

Q. And that applies even when you have the big stars?

A. No, when we have the stars we get away from that thing. We reserve those nights when we don't have to give anything away.

Q. You don't have to give anything away when you have stars? A. No.

1865

Q. Even with stars only ten or fifteen per cent. of the pictures are real outstanding pictures? A. About that, yes.

Mr. Driscoll: That is all.

Mr. Pollak: That is all.

(Discussion off the record.)

Mr. Driscoll: That brings us to the proposition of the showing of the picture. Counsel for the plaintiffs understands that counsel for the defendants proposes now to adjourn to the projection room of Metro-Goldwyn-Mayer and have Metro-Goldwyn-Mayer screen "Letty Lynton" for the benefit of the Special Master. To that we say that it is entirely outside of the issues being tried before the Special Master. We object to it as incompetent, irrelevant and immaterial and not within any issue that has been referred to the Special Master for hearing and decision.

1866

The Special Master: I will take the same attitude towards that as I did towards walking through the studio, that is, that the Special Master does not recognize it as evidence; the Special Master recognizes it as possible help to understand evidence. I don't see how you can take any other point of view on it. I haven't any jurisdiction here to pass on any

Colloquy of Counsel.

other subject except the accounting between these plaintiffs and defendants.

1867

Mr. Pollak has a theory, which Mr. Driscoll strongly contests, as to what the proper method of accounting ought to be, and he has introduced a lot of oral testimony over the objection of Mr. Driscoll. And it cannot be denied that I walked through the studio at Culver City. So in my opinion it has been possible for me to understand the testimony that is adduced before me. I do not expect to be able to mirror to the Court my walk through the studio or to mirror to the Court the showing of this picture. If the Court wants to see it—

1868

Mr. Cohen: It may do so.

The Special Master: I am frank to say that the only reason I am going to see the picture is because it is conceivable that it might—though I don't exactly see how—it might help me make my report possibly more intelligible to the Court.

Mr. Pollak: In order to be perfectly clear about our position, as Mr. Driscoll objects to your going to see the picture, I want to object to any ruling that it is not evidence; I think that it is.

The Special Master: What is the reason for my seeing that picture?

Mr. Pollak: For this reason; if your Honor please. In our view the prime issue in the case is whether or not plaintiffs are entitled to all of the profits of this motion picture. That issue runs, as we believe, through every issue and phase of this case, its production, distribution and exhibition. We say, as you know, that what they are entitled to is the ratable proportion of the total production ascribable to their contribution. That would be at the outside the ratable proportion ascribable to the written material and it would be less than that, for these

1869

Colloquy of Counsel.

1870

reasons: that as was seriously noted in the opinion of the Circuit Court of Appeals some part of the plaintiffs' own production is not original and is not copyrightable, being based upon matter in the public domain, namely, the trial of Madeline Smith. As was also noted in the opinion of the Circuit Court of Appeals, a very large part of the defendants' picture was not taken from the plaintiffs' play. As one inclusive item, the dialogue in the picture is admittedly original.

1871

Now, on the issue of the contribution of other arts than that of writing to the production, to the picture that was produced, distributed and exhibited, we do think that the actual showing of the film is the best representation of the contribution of the arts and sciences, the costuming, scenario writing, sound production, and many others. We did expect not only to have your Honor see the picture but to have the District Court and the Circuit Court as well see it.

Mr. Driscoll: They did see it, both of them.

Mr. Pollak: They have not seen it from this view.

The Special Master: I am going to see the picture.

Mr. Driscoll: I simply want to record an objection and exception to the theory at this time.

1872

(Thereupon further taking of testimony was adjourned until Friday, July 9, 1937, at 10 A. M.; and the Special Master, attended by counsel, proceeded to the offices of M-G-M at 1540 Broadway, New York City, for the purpose of viewing the motion picture "Letty Lynton".)

Colloquy of Counsel

JULY 9, 1937.

1873

The Special Master: Mr. Driscoll, will you agree to state what your position is in reference to Defendants' Exhibit L-7?

Mr. Driscoll: I just don't understand your question.

The Special Master: I mean, are you taking it in whole or in part. In other words, assuming that Loew's must be forced to account for this, do you claim that the Per Week profit on these theatres is too low?

Mr. Driscoll: Oh, yes.

The Special Master: As to all items or as to any particular items? 1874

Mr. Driscoll: I think, as a matter of fact, to be perfectly frank with you, that most of this overhead can go out of general expense; I don't think there is any justification for it.

The Special Master: What is your argument on that? You don't mind telling me now, do you?

Mr. Driscoll: I don't mind telling you at all. The set-up there is not affected in any way by the exhibition of "Letty Lynton". The theatre was in existence, the mortgages were in existence, the interest was paid, the taxes went on whether "Letty Lynton" was shown there or not. The only thing that is affected by "Letty Lynton" is the operating charges for the theatre; this corresponds to the proper charges in the making of the picture. If the house was dark, as some of their houses are, their taxes and other expenses of that type would go on just the same. 1875

The Special Master: Your position is that the only thing they are entitled to credit for was ordinary operating expenses during the period that "Letty Lynton" was showing there?

Colloquy of Counsel.

1876

Mr. Driscoll: That is right. If this was a theatre that was built to show "Letty Lynton", it might be a different proposition.

The Special Master: Is there any particular significance in your examination of these particular statements, these particular items?

1877

Mr. Driscoll: No; I just want to check on one or two of these theatres. I just wanted to get their set-up on these things. I think I ought to have a fairly intimate idea of how they set this thing up. I am not quarreling with Mr. Mills or his figures here. I am just trying to learn what it is all about, more than anything else. I think that is all I wanted to know about that. Weren't there some other items we wanted to get from Mr. Mills? Have you the information in regard to the shorts and the features, and so forth? You gave it to me over the phone. Mr. Cohen stated to me over the telephone that the number of feature pictures distributed over that year, actually sold, was 41.

1878

Mr. Cohen: I find that in addition to the 41 feature pictures which were distributed during the motion picture season of 1931-1932, there were two re-issues of pictures also distributed that year. I don't know, of course, whether you would constitute that a release or not. But as a matter of fact there were two re-issues of old pictures, one I believe was "Ben Hur", and "The Big Parade"; those are feature pictures, the income of which, of course, is reflected in the gross receipts.

Mr. Driscoll: In addition to that, how many shorts were distributed?

Mr. Clarke: In order to refresh your recollection, Mr. Cohen, you said you distributed 43 two-reel shorts and 41 one-reel shorts.

Mr. Cohen: If those are the figures I gave you

Colloquy of Counsel.

over the wire, they are correct; approximately 84. 1879
If I should find there is a variance in a picture or two, I will let you know.

Mr. Driscoll: That makes 41 new pictures that were made and distributed that year, two re-issues and 84 shorts.

Mr. Cohen: 84 more or less; don't hold me too close on that.

Mr. Driscoll: That is for the record; if there is a correction you can change it later on. I assume that among the 84 were your news reels and things of that type?

Mr. Cohen: No, your assumption is not correct. In addition to the shorts there were, of course, news reels, which were not gotten out by Metro or by Loew. 1880

Mr. Driscoll: But distributed by the Distributing Company?

Mr. Cohen: Yes.

Mr. Driscoll: And they were how many a week?

Mr. Cohen: Two a week.

Mr. Driscoll: Making 104 news reels.

Mr. Cohen: Making 104 news reels.

Mr. Driscoll: I want to know if that, in substance—I don't want to be picky about it—but in substance is that the entire product that was handled by the Distributing Company for the fiscal year? 1881

Mr. Cohen: I understand there was nothing else.

Mr. Driscoll: What I want to do is to clear up the business of the company as comprehensively and briefly as we can do it. I think the record shows to a great extent the difference between release and distribution. It is a fact and I think it might be put here in a simple statement. If you don't agree with me, you can correct it.

Before a picture is made it is actually being distributed. Contracts are being made by the distribut-

Colloquy of Counsel.

1882

ing company before the exhibition of that picture, before it is made or released. After the picture is made the release date is set. The release date is approximately the first date that it is exhibited to the public. Just after release the distribution continues, that is, the sale of the picture, so that actual distribution of a picture might take place for six months before release and six months after release.

The Witness: I wouldn't say distribution takes place.

Mr. Clarke: The distributing company is functioning as a sales organization.

1883

Mr. Cohen: That happened in this particular case with "Letty Lynton"; contracts were entered into long before the release date.

Mr. Driscoll: The first contracts were made in May, 1931; and the first release was in May, 1932.

Just before leaving this, might I just add one other fact. This business handled domestically by the Distributing Company within a certain year is generally handled to about the same extent by the foreign distributing organization the next fiscal year.

1884

Mr. Cohen: Except this, Mr. Driscoll, that we take an average of the features that were distributed in parts of the world other than the United States for the year 1932-1933 and we find that no such number as 41 or 43 was shown in these parts; we find the average, so far as we can tell at that time, was 33 in 1932-1933.

Mr. Driscoll: When you say an average of 33 was shown, you mean, do you not, that taking all of the foreign offices practically no one foreign office outside of Great Britain would show all of the 41 features distributed that year, but the total features of all foreign offices did average 33?

Mr. Cohen: That is right.

Colloquy of Counsel.

Mr. Driscoll: But it is a fact that Culver 1885
died all 41 features, whether it was able to distrib
them in every country or not?

Mr. Cohen: I believe that is correct.

Mr. Driscoll: Culver handled the entire output?

Mr. Cohen: Yes.

Mr. Driscoll: How about the shorts for foreign
distribution; they are distributed in about the same
way?

The Witness: The ordinary shorts would be in
about the same proportion. Certain ones would be
eliminated from certain countries and the general
average should be about the same. The ones re- 1886
leased, of course, should be different. You appre-
ciate that from the nature of it.

Mr. Pollak: I think we can add this: in general
the news reels are not distributed abroad.

Mr. Driscoll: I think we are finished with that.

The Special Master: Are you finished with your
examination of these financial matters?

Mr. Driscoll: Yes. I think that completes every-
thing down to the schedule of officers and directors.

The Special Master: Yes. That is to be marked
Plaintiffs' Exhibit M when furnished. It is to be
sent to me.

The Witness: You asked for some checks of the
Astoria Theatre Corporation, which I have here. 1887
(Papers handed to counsel.)

Mr. Driscoll: I would like to have noted on the
record that the checks produced from the files of
the Astoria Theatre Corporation, show a check
\$923.63 made to the order of Harvey Everett, Mana-
ger, \$2,600.81 is made to the order of Marcus Loew
Booking Agency and the check for \$3,583.56 is made
to the order of Astoria Theatre Corporation. They
are all dated in June, 1932.

Colloquy of Counsel.

1888

Mr. Pollak: In order to avoid any question, I would like to ask a question of Mr. Driscoll. It is not contended that the checks in any way are inconsistent with the testimony given by Mr. Mills?

Mr. Driscoll: No; that is not my purpose. If you want to know my purpose, it is that one check was made to Marcus Loew Booking Agency. I think the testimony took care of that later (see footnote).

Mr. Pollak: At page 37 of the prior printed record I read the following from the testimony of the plaintiff, Margaret Ayer Barnes.

1889

Mr. Driscoll: This, of course, is taken subject to my objection as incompetent, irrelevant and immaterial, having nothing to do with any of the issues referred to the Special Master for trial and report and having nothing to do with any of the issues that have been raised by the accounting.

Mr. Pollak: This testimony shows when "Dis-honored Lady" ran. It is peculiarly valuable as showing the value of motion picture rights.

The Special Master: Technically isn't all this in anyway?

Mr. Pollak: I don't think it is; and besides it is vastly more convenient for any Court to have a record limited the way we are now limiting it.

1890

Mr. Driscoll: That objection will go to all that is offered.

(In ensuing hearings before the Special Master, the testimony of various witnesses at the trial, contained in the prior printed record (hereinafter for brevity, referred to by the abbreviation "P.P.R." and also called Proceedings before Accounting) as well as certain exhibits admitted at the trial and also contained in such prior printed record were admitted in evidence before the Special Master. In most all cases the testimony and exhibits were not actually copied in the Accounting Record, but were incorporated therein only by reference to such prior printed record, and in each case were given a reference number. In the case of the exhibits there were super-added exhibit numbers in this proceeding viz "R-1, R-2" etc. Such testimony, for the most part, and exhibits have not been actually printed as part of this record, but, by stipulation of the parties are incorporated in this record only by reference to the prior printed record.)

Test. of M. Ayer Barnes, Read into the Record—for Defts.

The Special Master: Yes. Objection overruled. Your exception is noted.

1891

(Nine following extracts from testimony of Mrs. Barnes called "Reference 1".)

Mr. Pollak (reading): " 'Dishonored Lady' played in Los Angeles September 8th to 20th, 1930. It closed in New York the end of May and Miss Cornell took a two months vacation, and it went into rehearsal again in August for the road and opened, I think, immediately in Los Angeles. At any rate it ran from September 8th to 20th.

" 'Dishonored Lady' was written in the years 1927 and 1928 and copyrighted January 18, 1930, in accordance with the certificate that has been offered in evidence here. It was produced on the road. We ran it two or three times on the road in January, 1930, and it opened in New York at the Empire Theatre February 4, 1930, and ran in New York until, I think, May 24th, the end of May of that year, 1930. It was produced in London in May of that year, the 7th or 8th it opened with Miss Fay Compton in the title role, and it played in Los Angeles in September from the 8th to the 20th, 1930, then it went on the road. It came East and it played in Boston and in Philadelphia and in Baltimore and in Chicago and ended just about Christmas of that year, in time for Miss Cornell to pick up 'The Barretts of Wimpole Street' in February. Then it closed in New York in 1931, approximately New Years of 1931."

1892

1893

I read from page 40 of the prior record the testimony of the plaintiff, Margaret Ayer Barnes, as follows, at folio 119:

" 'Dishonored Lady' had its initial conception in the record and history of a famous English murder trial which took place in Glasgow, Scotland, in 1857, namely, the trial of Madeleine Smith."

Test. of M. Ayer Barnes, Read into the Record—for Defts.

1894

I read at page 44, folio 131, from the testimony of Mrs. Barnes, as follows:

"The novel 'Letty Lynton', as was our play 'Dishonored Lady', was based upon the Madeleine Smith trial."

At page 50 I read further from the testimony of the plaintiff, Mrs. Barnes, folios 150-152. Simply in the interest of clarity I ask that there be a stipulation, because it begins with a pronoun, that "he" refers to Mr. Sheldon.

1895

"In the case of 'Dishonored Lady' it was his suggestion that we do it. I had never heard of the Madeleine Smith trial, but he had. Of course, having been a dramatist all his life he was interested in anything that might make for drama. He had heard a good many trials at one time or another, long before. Perhaps five or six years previous he had read the Madeleine Smith trial and he had it in mind that it would make a good play, and it was his idea that we do it. I was in New York back and forth two or three weeks and I would give him time in the evenings and we discussed the action and the dialogue and the dramatic and scenic structure of the play, and then, of course, as I live in Chicago, with a husband and three children, when I went back I wrote it on the typewriter and prepared the script of the scenes that we had described in the form of dialogue and sent them back as they were written, act by act, and they were read to him by his secretary, and he would propose cutting or enlarging them a little. The inspiration was his originally, his idea of the Madeleine Smith case."

1896

I now read at page 43, folio 127, and ask for a stipulation that the statement, "we did have a scene", refers to the plaintiffs' play "Dishonored Lady".

Mr. Driscoll: Yes.

Test. of M. Ayer Barnes, Read into the Record—for Defts.

Mr. Pollak (reading): "We did have a scene that indicated sexual intercourse in our play 'Dishonored Lady' as the curtain drops. We intended the audience to understand that those two people were having sexual relations.

1897

"That scene was worked up to create the impression upon the mind of the public and upon the mind of the spectator that the relations between that man and that woman were illicit relations.

"There were two scenes in our play where the actions between the heroine and her lover are worked up to a point where they retire to a room to commit sexual intercourse. The inference after the curtain dropped was that they had met as lovers. Their relations between them, as they played it, were such as to convey the impression to the spectator that those two people are ready to have sexual intercourse."

1898

Mr. Driscoll: I think it only fair to state that the statement by the plaintiff Barnes is a summary statement of the testimony of Mrs. Barnes under cross-examination by the attorney for the defendants.

Mr. Pollak: This is testimony of Mrs. Barnes given under oath.

Mr. Driscoll: It is not question and answer. It is a summary statement of the testimony given by Mrs. Barnes under cross-examination.

1899

Mr. Pollak: By summary statement it is meant that in accordance with the practice in preparing a record on appeal the questions are sometimes but not always omitted.

Mr. Driscoll: In this case the questions were omitted.

Mr. Pollak: I want to add that the record on appeal was prepared by the plaintiffs and stipulated by them as correct.

Colloquy of Counsel.

1900

Mr. Driscoll: By counsel for the plaintiffs. The questions and answers are omitted here. This is testimony developed on cross-examination by counsel for the defendants.

Mr. Pollak: In narrative form.

Mr. Driscoll: We do not want it to have an ugly look that it does not deserve.

Mr. Pollak: I don't suppose it is suggested that the witness would testify any differently if questioned by one counsel or the other.

I read from page 47, folios 440, 141 (reading):

"Question: In the first place, you did have such a scene with the players retiring to a room and indulging in sexual intercourse?"

1901

"Answer: Well, the curtain drops. That is the entire act.

"Question: But the scene was intended to convey that those two persons were retiring to indulge in sexual intercourse?"

"Answer: Yes.

"The Court: Is that the last act that is referred to?"

"Mr. Burkan: Yes. There are two scenes and that is in the last act.

1902

"Question: Now, as a matter of fact, this identical scene is repeated twice in the play, is it not, Mrs. Barnes?"

"Answer: Why, on two occasions. Of course, obviously the identical scenes are not repeated in any plays, but the two actions in the play show Madeleine Carey in the arms of Jose Moreno, the first time to become his mistress and the second time having become his mistress. There is that similarity."

I now read from page 45 at folios 133-134:

Mr. Driscoll: What does all this prove, Walter? That they had sexual intercourse?

Test. of M. Ayer Barnes, Read into the Record—for Defts.

Mr. Pollak: I think I must answer that, obviously certain portions of the plaintiffs' play were not available for the movies. 1903

Folios 133-134, page 45—I will explain that this is quoted from an affidavit Mrs. Barnes had previously executed and read into the record once before.

(Reading:) "In our play 'Dishonored Lady' when the menace takes her in his arms, the physical contact, the passion of Madeleine is so great that she succumbs to Moreno's embraces and they go to his bed room and indulge in sexual intercourse."

I read from page 50, folio 148, from the testimony of Mrs. Barnes (reading):

"I hoped very much we would make the sale and the play would be changed." 1904

(The following papers were designated Reference No. 2 and marked in this proceeding as "Defendants' Exhibit R-1".)

I now read from volume two of the prior printed record, which contains exhibits, and I offer Plaintiffs' Exhibit S which is printed at page 788 and consists of two documents headed "Proposed contract for purchase of motion picture rights of 'Dishonored Lady' by Metro-Goldwyn-Mayer Corporation." It extends from page 788 through page 803. I don't think it is necessary to write them into the record. 1905

Mr. Driscoll: I just want to record my objection again.

The Special Master: Overruled and exception.

Mr. Pollak: I want to read, because of its great importance, the first one of these documents. It is in the form of a letter signed by Guthrie McClintic, Charles Frohman Inc., James F. Reilly Secretary, and Margaret Ayer Barnes, under date of

Exhibit Read into the Record.

1906

April 15, 1931, addressed to Metro-Goldwyn-Mayer Corporation, 1540 Broadway, New York City, and Joseph E. Bickerton, Arbitrator, 220 West 42nd Street, New York City. (Reading:) "Dear Sirs: We are executing the contracts for sale of motion picture rights in 'Dishonored Lady' to Metro-Goldwyn-Mayer Corporation, with the understanding that this sale is contingent upon their being able to secure the approval of the Hays office of their use of this play for picture purposes.

1907

"Our assignments are therefore delivered to Mr. Bickerton with this understanding, which is that Metro, if it obtains this approval within thirty days, will on its part then sign the contracts and pay Mr. Bickerton the \$30000 therein provided, but Metro is not obligated to take the rights unless within thirty days it secures such approval of the Hays office, and if it does not so secure such approval then the contracts now signed by us and deposited with Mr. Bickerton will be returned to us by Mr. Bickerton."

I call for a stipulation in that connection that Guthrie McClintic is and was at this time the husband and manager of Miss Cornell.

1908

Mr. Driscoll: He was supposed to be the husband. I don't know; I was not there myself. I could not really say that he was the husband. Unless you say he was the husband. If you say he was the husband I will take your word for it.

Mr. Pollak: Is there any dispute about it?

Mr. Driscoll: I wouldn't dispute that he was the husband.

Mr. Pollak: Subject to correction.

I call for a further stipulation that Charles Frohman Inc. is a theatrical corporation having an interest in the play "Dishonored Lady".

Testimony of J. L. Lasky, Read into the Record—for Defts.

Mr. Driscoll: No, no such stipulation.

1909

Mr. Pollak: I call for a stipulation that they produced the play.

Mr. Driscoll: Well, that either Frohman or Guthrie McClintic did. I have been informed that it was not Frohman, but Guthrie McClintic produced the play.

Mr. Pollak: Do I get a stipulation that they were a theatrical corporation?

Mr. Driscoll: Charles Frohman, Inc.? Yes.

Mr. Pollak: That suits me. The long formal contract, Mr. Master, I will not read.

(The following was designated Reference No. 3.)

1910

I read from the testimony of Mr. Lasky at pages 146-148 of the record, folios 438 to 444 (reading):

"My name is Jesse L. Lasky. My residence is 609 Ocean Park, Santa Monica, California. My occupation is a motion picture producer. I was an officer of Paramount-Publix Corporation. I was the first vice-president in charge of production until about three months ago, and have been since about 1915. The business of that corporation is the production of motion pictures.

"Charles Frohman Inc. are producers of legitimate plays. They are a subsidiary of Paramount-Publix Corporation, which owned their stocks.

1911

"Charles Frohman Inc. produces plays. Some of the plays Charles Frohman Inc. has produced in the past few years, in which Katherine Cornell has taken the leading part, are 'Dishonored Lady', and a play before that of which I don't recall the title. I think it is 'Casanova'. She has also appeared in 'The Barretts of Wimpole Street'. At the present time I do not recall all others.

"Charles Frohman Inc. in 1930 produced a play 'Dishonored Lady', in which Katherine Cornell took the leading part.

Testimony of J. L. Lasky, Read into the Record—for Defts:

1912

"The Motion Picture Producers and Distributors of America Inc. is an association of the leading producers and distributors in the motion picture industry. The president is Will H. Hays. The Paramount-Publix Corporation is a member. Its purpose is to advance the interests of the motion picture industry in its various branches and to exercise a watchful eye over the type of play that is selected for production on the screen. The Motion Picture Producers and Distributors of America, Inc. took action with reference to the play 'Dishonored Lady' as to its fitness or unfitness for motion picture screening.

1913

Through the president, Will H. Hays, all the companies were notified that they did not consider the subject matter of 'Dishonored Lady' fit or safe for motion pictures. That was within a few weeks after the play was produced.

"In the spring of 1931 Metro-Goldwyn-Mayer Corporation was interested in purchasing the motion picture rights to the play 'Dishonored Lady'. Through one of their officers, Mr. Rubin, they took up with me personally the question of purchasing the play. The Paramount-Publix Corporation did have a financial interest in the sale of the motion picture rights to Metro-Goldwyn-Mayer Corporation or others of the play 'Dishonored Lady'. The Paramount-Publix Corporation were interested and would have received for its subsidiary, the Charles Frohman Company, whatever amount the play was sold for less half of the amount which would have gone to the author.

1914

"I had several discussions with Mr. Will H. Hays about June 1, 1931, regarding removing the so-called ban on the play, in which I told him that I thought the play should be produced for pictures, but he refused the consent of the Motion Picture Producers and Distributors. He did not comply with the request, and stated that it was almost the unanimous

Exhibits Offered in Evidence.

opinion of the members that the play was not safe or fit material, and that he saw no reason or nothing had transpired to make them change their minds, and refused to consent to let it be produced."

1915

(The following described book was designated as Reference No. 4 and marked in this proceeding as Defendants' Exhibit R-2.)

I offer in evidence the original "Trial of Madeleine Smith". It appears in the trial record as Defendants' Exhibit E. It was not physically printed, and a copy will be handed to your Honor. It is a bound book, appearing in "Famous English Trials", or something similar to that.

1916

Mr. Driscoll: I want to make the same objection, and renew my objection to that exhibit.

The Special Master: I don't know exactly what the point is.

Mr. Pollak: As to that exhibit, sir?

The Special Master: Going back to the trial.


Mr. Pollak: The point is specifically based on the proposition enunciated in Judge Hand's opinion in the case, that so much of the plaintiffs' play as was based upon the Madeleine Smith trial is not copyrightable material. It is connected with the testimony I have already read to your Honor, given by Mrs. Barnes, that the inspiration of the plaintiffs' play was the Madeleine Smith trial.

1917

The Special Master: It is accepted, with the objection and exception.

Mr. Pollak: It is related, specifically, if your Honor please, to the authorities I cited in my memorandum holding that an improver in patent cases, one who merely improves, does not create the new object and gets as against the infringer only a share

MICRO CARD

TRADE MARK 

22

39



1413

65



Exhibits Offered in Evidence.

1918

of the profits ascribable to the infringement. The same principle obviously holds in the field of copy-right law, the analogy being to the patents.

(The manuscript of the play "Dishonored Lady" was designated Reference No. 5 and marked "Defendants' Exhibit R-3".)

I now offer in evidence from the prior record Plaintiffs' Exhibit 1, the manuscript of the play "Dishonored Lady", printed at pages 237 to and including page 494.

1919

Mr. Pollak: We should get up a series of exhibit numbers when this is arrived at. Of course, the exhibit system is not applicable to extracts from the testimony.

I do not plan to read this long exhibit to you. I do want to read exactly two folios at the beginning (reading):

"'Dishonored Lady'. A play in three acts, by Margaret Ayer Barnes and Edward Sheldon. 'Dishonored Lady'. The authors salute with gratitude Miss Madeleine Smith of Glasgow, whose conduct in 1857 suggested to them this play. Accordingly they make a friendly and admiring bow to her across the years."

1920

The Special Master: Will that be all, Mr. Pollak?

(The following continuity of the motion picture "Letty Lynton", actually printed in "P.P.R.", pages 495-622, was designated Reference No. 6 and was marked "Defendants' Exhibit R-4".)

Mr. Pollak: If your Honor please, I am going to put in one of the two continuities of the picture that were put in evidence at the prior trial. There

Exhibits Offered in Evidence.

is no need of putting in both. But I have no such familiarity with the facts of the case as to decide offhand which to put in. Have you any particular objection to both being put in?

1921

Mr. Driscoll: I am very familiar with both of them as a matter of fact. The one continuity is one from which the picture was made, and the other was made from the picture.

The Special Master: We will consider one of them marked. You can decide which one later.

Mr. Pollak: This exhibit will be supplied.

(The following novel "Letty Lynton" was designated Reference No. 7, was marked "Defendants' Exhibit R-5".)

1922

I offer in evidence the novel "Letty Lynton" by Mrs. Belloc Lowndes, received as Defendants' Exhibit C at the last trial. That is also a printed book. It is not printed in the record.

(The following assignment was designated Reference No. 8 and was marked "Defendants' Exhibit R-6".)

I offer in evidence assignment of motion picture rights of the novel "Letty Lynton", appearing as Exhibit D in the prior record and printed at page 826, from folio 2477 to folio 2484. We can supply that.

1923

The reading of the testimony that remains, some of it, will take some time. It is about 30 pages.

The Special Master: Don't you think you might identify it and not read it, because I will have to read it anyhow?

Mr. Driscoll: Wouldn't we save a lot of time if he offered both volumes in evidence?

Arthur M. Loew—for Defendants—Direct.

1924

The Special Master: I think we would save a lot of time if he will get them up in a series of exhibits and put it in, with your objections and exceptions noted.

Mr. Pollak: There are not many more items but I think as to the remaining items I could save some space and time by not physically reading all of the testimony of these witnesses I had in mind, but marking them for you. I will do that.

The Special Master: Do that. Besides that what have we got to do?

(Informal discussion off the record.)

1925

(Thereupon further hearing was adjourned to a date to be fixed by the Special Master.)

HEARING OF AUGUST 11, 1937.

ARTHUR M. LOEW, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

1926

Q. Mr. Loew, what is your full name? A. Arthur Marcus Loew.

Q. And your residence? A. Glen Cove, New York.

Q. And your occupation? A. I am Vice-President of Loew's Incorporated.

Q. Did you at any time hold a position with the Culver Export Corporation? A. Yes, I did; I was President of that Corporation.

Q. Were you president in the years 1932 and 1933? A. I was.

Q. And putting a more personal question, how old are you? A. Thirty-nine.

Arthur M. Loew—for Defendants—Direct.

Q. Mr. Loew, had you been President of Culver Export Corporation for a number of years before 1932 and 1933?

1927

A. Yes, I had.

Q. Approximately since its organization; is that right?

A. Yes, that is right.

Q. When was that? A. 1925, I believe.

Q. In 1932 to 1933 did you hold any other position with any of the different companies besides President of Culver Export Corporation? A. Officially I was a Vice-President of Loew's Inc.

Q. Also in 1932 and 1933? A. Yes.

Q. Did you draw any salary from any corporation other than Culver Export Corporation? A. No.

Q. Mr. Loew, will you tell us in your own way what in general were the duties and activities of the President of Culver Export Corporation in the fiscal year 1932 to 1933?

1928

A. The Culver Export Corporation at that time had entire charge of the marketing of M-G-M pictures outside of the United States and Canada, and the President himself at that time supervised the business of the corporation.

Q. In a general way, what did this work of supervision entail? A. Well, it entailed completing productions, I might say. Shall I explain that?

Q. Yes. A. The productions as they are delivered to us from our studios are in a form that have to be altered somewhat to meet conditions abroad. In some cases we have to put them into foreign languages, that is, make English pictures talk French or other language. In other countries we have to edit them with superimposed titles so that they will be understood in those non-English speaking countries. After that, of course, we have to maintain our offices abroad and supervise the distribution and the sales of the pictures.

1929

Q. You were doing business in about how many countries abroad in 1932-1933? A. About 46.

Q. Can you tell us what traveling, if any, you person-

Arthur M. Loew—for Defendants—Direct.

1930 ally did in the year 1932-1933? A. I made a list of the countries I visited.

Mr. Pollak: I think the witness may refresh his recollection from the list.

A. (continued; after examining list) I visited Mexico, Guatemala, Panama, Peru, Chile, Argentine, Brazil, Trinidad, Porto Rico, France, England, Italy, Belgium, Holland, Switzerland. I made two visits to California. I visited Hawaii, Australia, New Zealand, Java, Straits Settlements, Indo-China, China, Japan, India, Egypt, South Africa, and France. That was in the calendar year 1932.

1931 Q. And these visits were in the course of your duty as an officer of the corporation? A. Yes.

Q. They were business visits? A. Yes, they were.

Q. I suppose when you were in these foreign countries you of course visited the local subsidiary corporations; am I right? A. That is what I went for.

Q. And also, while you were here in New York, you kept in touch with these foreign corporations? A. We are in constant touch with them.

Q. Had you in 1932-1933 subordinates of your own whose functions also involved traveling abroad? A. Yes, I had.

1932 Q. Did their functions, or the functions of one or more of them, involve roughly the same amount and kind of travel as yours? A. Of the same kind, but probably not as much.

Q. Mr. Loew, testifying in round figures, can you give us estimates—and you may refresh your recollection—of the gross business of the Culver Export Corporation in the years 1921-1922 as a fiscal year, and 1926 to 1927 and 1927 to 1928 and 1932 to 1933, and you may, in answering that question, unless there is objection, give your answers in the nearest hundred thousand, unless the figures reach a million; if they reach a million give us the million.

Arthur M. Loew—for Defendants—Direct.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial. I don't think we are interested in the gross business done by Culver in the ten years prior to the distribution of this picture. We will be going back to the Cleveland administration or the Civil War.

1933

Mr. Pollak: If your Honor please, there was a specific attack by them in the testimony and in the briefs on Mr. Loew's salary and the amount thereof. There was also repeated and specific contention that the whole Culver Export Corporation was a useless expense and a contention that they performed no useful function.

The Special Master: Let him answer the question, Mr. Driscoll: Exception.

1934

A. In the year ending August 31, 1922, which was the first year that I joined the foreign department, such as it was at that time, the gross business at that time was slightly over \$600,000. In 1925 the gross business was almost three million and a half. In 1928 it was over eleven million and a half, and in 1933 it was almost fifteen million and a half.

Q. I think that is far enough. You need not carry the figures any further unless Mr. Driscoll wants them. Now, Mr. Loew, you can answer this yes or no. It is the fact, is it not, that in the fiscal year 1932-1933 your salary was somewhat increased? A. Yes.

1935

Q. Answer the next question yes or no. It is also the fact, as I understand it, that in that same fiscal year the salaries of some of the employees of Culver Export Corporation were reduced, is that right? A. That is right.

Q. Will you tell in your own way the circumstances in regard to those salary shifts including both your own increase and the reduction of the salaries of some of the other employees?

Arthur M. Loew—for Defendants—Direct.

1936

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

1937

A: Just a few months I should say before this decrease was put through I was given quite a substantial increase in salary because of the business done by the Culver Export Corporation. Then a few months subsequently the general policy of Loew's Incorporated was to reduce salaries of employees generally by a certain percentage. At that time Mr. Schenck, the President of Loew's Incorporated, called me in and said that he would like to make a reduction worldwide, to which I objected because we had just completed our most successful year and had made our greatest profit, and I objected on my own behalf as well as my subordinates.

After a great deal of discussion, we did not reduce any salaries of employees abroad and I refused to take any reduction of my own salary and tried to persuade him not to reduce the salary of anyone connected with the Culver Export Corporation. Because of their unfortunate geographical location, being in the same building with Loew's Incorporated, he thought it would be a very bad thing for the morale of the rest of the corporations and he insisted upon reducing the salaries of the other employees of the Culver Export Corporation.

1938

Q. You say you objected to having your own salary reduced. What did you say in terms or substance?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Overruled.

Mr. Driscoll: Exception.

A. I told him I would not accept a salary reduction, and I told him I would sooner not work any further for the company.

Arthur M. Loew—for Defendants—Direct.

1939

Q. Mr. Loew, at that time approximately what was the total amount of your personal stockholdings in any of the Loew companies? A. I did not search the record for that, but I know it was not more than two or 300 shares.

The Special Master: At the time that he told them he would not take a reduction in salary, was that to the board of directors of the Culver Export Corporation?

Mr. Cohen: No; to Mr. Schenck.

1940

Q. Who were the board of directors of Culver Export Corporation at that time, if you know? A. I remember some of them. I don't know if I remember all of them. I was a director.

The Special Master: Isn't that in evidence somewhere? - I thought you were to put in evidence the members of the boards of directors of those companies.

Mr. Pollak: I might at this time put in evidence this exhibit. A copy has been given to the plaintiffs' counsel. I offer in evidence a document giving a list of the officers and directors of Loew's Incorporated, Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, and Culver Export Corporation, the defendants in this case, for 1932.

1941

(The papers just offered were received in evidence and marked respectively Defendants' Exhibits Nos. 27-A, 27-B, 27-C and 27-D, of this date.)

Q. Mr. Loew, am I right in this, that the conditions of distribution and exhibition of motion pictures vary substantially in the foreign market as compared with the American market? A. Yes, they do.

Arthur M. Loew—for Defendants—Direct.

42 Q. Am I also right in this, that in addition foreign countries differ substantially one from another? A. That is right.

Q. And that applies to the whole group of causes that affect the success or failure of a picture; conditions of language and climate, I suppose, and the feeling of the people towards a particular class of exhibitions; is that correct? A. That is right.

Q. And generally speaking, any one foreign country will have problems peculiar to it; is that right? A. That is right.

43 Q. Is this true, Mr. Loew, that the M-G-M pictures which are exhibited in foreign countries will show a different selection in different countries, generally speaking? A. What you mean to say is that there are not any two pictures exhibited in the same countries throughout the world?

Q. That is correct. A. Generally speaking.

Q. One picture will be exhibited in countries A, B, C, D, E, F and G, and another picture will be exhibited in countries A, B, C, F and Q? A. That is right.

Q. Now, Mr. Loew, from your experience in the foreign business, can you form any judgment whether in a foreign field the reputation of the great American stars contributes to the success of a production?

44 Mr. Driscoll: That is objected to as incompetent, irrelevant and immaterial, not within the issues to be tried here.

The Special Master: I know what you are leading to. I think it is a terribly vague kind of testimony. I think you had better go ahead and put it in.

Mr. Driscoll: Exception.

A. Yes, I think we have definite proof there is a great difference.

Q. Will you tell us in your own way the nature of that

Arthur M. Loew—for Defendants—Direct.

proof? A. The nature of the proof is in the box office receipts. We have certain stars that are "box office", as we call them, and other people who do not mean anything. We also, I might add, had definite proof at the time that talking pictures were first introduced. At that time we made several foreign language versions of the same picture, without the same cast, and in a great many cases where those languages were spoken they insisted on releasing the original English version with the original star and cast sooner than release the special foreign language version that we had made for the country.

1945

Q. That is, when you had the so-called shot foreign version you would then put in a French actress to speak the French part, is that right? A. Yes.

1946

Q. And you would have a French cast? A. That is right.

Q. That cast naturally would not have any distinguished Hollywood stars in it, I take it? A. That is right.

Q. Answer this question, yes or no. Did you or did you not supersede these foreign shot productions by synchronized productions; did you so replace them? A. Yes, we did.

Q. Will you tell us the reason for that, or the reason for replacing the shot foreign version by the synchronized version? A. We replaced them because of the demand for the American star.

Q. Can you tell us, Mr. Loew, whether you would class Jean Crawford in 1932 to 1933 in the foreign field as "box office", as you put it?

1947

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues.

Q. By "box office" you mean having a large box office appeal? A. Having a large public appeal.

Arthur M. Loeb—for Defendants—Direct.

1948

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

Q. Does your answer apply both in the foreign English-speaking countries and in foreign countries where English is not spoken? A. It applies in both. I believe that Joan Crawford was more popular in the English speaking countries, but she was very popular in both.

Q. Taking first the non-English speaking foreign countries, how high as near as you could judge would you rank her in public appeal among American actresses?

1949

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues here. There is no contest between this picture and any other picture. It is a waste of time.

The Special Master: Overruled.

Mr. Driscoll: Exception.

A. I think she definitely would be placed among the first six.

Q. In the non-English speaking foreign countries? A. Yes.

Q. And in the English speaking foreign countries? A. She would be among the first six, but higher up.

1950

Q. Would you be familiar with the box office appeal, if any, of Mr. Robert Montgomery, in 1932-1933? A. Yes.

By Mr. Pollak:

Q. You said you are familiar with Mr. Montgomery's reputation in 1932-1933 abroad? A. Yes.

Q. Are you familiar with that reputation in the English speaking foreign countries and in the non-English speaking foreign countries? A. I am.

Q. What would you say concerning that reputation? A. Montgomery had a definite appeal abroad. He was defi-

Arthur M. Loew—for Defendants—Direct.

nitely a popular star abroad. I do not think he was as popular as Crawford, but he was not very far behind her.

1951

Q. Does that apply to both English and non-English speaking foreign countries? A. It applies more to English speaking countries than to non-English speaking countries.

Q. Did the reputation of Mr. Clarence Brown extend to foreign countries in 1932-1933? A. Mr. Brown was definitely known as a good director.

Q. Abroad? A. Abroad.

Mr. Driscoll: Did he say by whom he was known as a good director?

The Witness: He was known by the public because he was connected, as I remember it, with several important Greta Garbo pictures which were very popular abroad and very well directed pictures. The press abroad knew him very well and the public became aware of Mr. Brown through the press.

1952

Q. Did the popularity of M-G-M, the producing company, if you know, extend to foreign countries in 1932-1933? A. Definitely.

Q. What was that reputation?

Mr. Driscoll: I can't see how this man can qualify as an expert to testify to the reputation of either Clarence Brown or anybody else or the M-G-M abroad. Reputation is a thing that is gauged by local people, people who live in the community, able to size up the individual or thing. Here is a man sitting in the Loew State Theatre Building in New York City, and Mr. Pollak would have him testify as to the reputation of M-G-M in China. I say he is not qualified to do it. It is a waste of time.

1953

The Special Master: I think it is very weak testimony. I do not see how this witness can tell

Arthur M. Loew—for Defendants—Direct.

1954

how the public in Czechoslovakia or some place like that think of Clarence Brown. I think I might almost take judicial notice of the fact that they do not know he exists.

Mr. Pollak: The witness has testified that he directed pictures of Greta Garbo.

By Mr. Pollak:

Q. What was the reputation of Greta Garbo abroad in 1932?

1955

Mr. Driscoll: Objected to as immaterial.

The Special Master: Sustained.

Q. Mr. Loew, in the testimony you have given concerning the reputation of Miss Crawford and Mr. Montgomery and the M-G-M organization, what sources did you base your opinion upon? A. Well, I base my opinion upon personal contacts. It is true that I have an office at 4540 Broadway, but when I travel throughout the world I have to leave that office, unfortunately, and I have direct contact with other offices abroad and they have direct contact with their public, and I also have some contact with the public myself.

1956

Q. When you say you have direct contact with your offices abroad, do you mean you receive reports from them?

A. I mean I am actually there, besides receiving reports.

Q. In the course of a year approximately how many foreign countries would you and your immediate subordinates have visited, Mr. Loew, in 1932-1933? A. I think either I or my immediate subordinates would have visited practically every country in the world.

Q. Your subordinates would report to you? A. Yes.

Mr. Pollak: You may cross-examine.

Mr. Driscoll: I do not want to cross-examine.
No cross-examination.

Arthur M. Loew—for Defendants—Direct.

Q. Mr. Loew, are you familiar with the normal rates paid for the distribution of pictures abroad, yes or no? A. Generally, yes. 1957

Q. In cases where distribution is not effected through subsidiaries, what would you say is a reasonable compensation for the home office for foreign distribution?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; not within the issues.

The Special Master: Irrespective of whether or not it is within the issues, I think you should be more specific. I think you had better limit it to what countries "Letty Lynton" was distributed in, not through a wholly-owned subsidiary. 1958

Mr. Pollak: It was distributed always through subsidiaries. What the testimony is designed to show, your Honor, is this: that the distribution charge made by the home office was reasonable, judged by business standards. I will take them country by country, if you wish.

The Special Master: You have a full accounting of what Culver Export Corporation did do, and I do not think testimony of what you have paid to the non-wholly owned distributors is of any particular value to us under those circumstances. You have shown what you claim is your cost of distribution. What difference does it make if you made a deal with some wholly-owned subsidiary to pay them 20 per cent or 30 per cent or 40 per cent? How many other considerations come into it? 1959

Mr. Pollak: I think this should be made clear. I think your Honor's analysis of essential legal principles is correct, namely, it is throughout a question of how the business was done by the defendants, and not how it might have been done. Indeed, the cases held that, even if the defendants were wasteful.

Arthur M. Loew—for Defendants—Direct.

1960

What I want to make clear to you is this: For their attack on Culver Export Corporation as a whole they say it was a useless thing; they deny the reasonableness of our charges, of our right to make charges. I want to say that but for Culver Export Corporation the cost of distribution would have been higher.

The Special Master: I do not think that testimony would be very helpful. I think where you have a full accounting, it has to stand on its own; there are so many other considerations that are involved if you distributed it through a non-wholly owned subsidiary that it would only mix us up.

1961

Mr. Pollak: Your Honor will give me an exception.

The Special Master: Yes.

Mr. Pollak: Mr. Loew has a further thought that he wants to bring out concerning the first part of his testimony concerning his salary.

By Mr. Pollak:

Q. Would you state in your own way the condition of the foreign field when you took hold of it in 1921 and 1922?

A. Yes. The foreign department, the so-called foreign department at that time consisted of one man who was in charge of sales, and a stenographer, and no offices abroad. In 1932 to 1933 we had 117 offices abroad and some 5,000 employees throughout the world.

1962

Mr. Pollak: I think that is all, Mr. Loew.
(Witness excused.)

DAVID BLUM, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows: 1963

Direct examination by Mr. Pollak:

Q. What is your residence? A. Naughright, New Jersey.

Q. And your occupation? A. Secretary of the foreign department of Loew's Incorporated.

Q. Are you connected with Culver Export Corporation? A. I am.

Q. Are you secretary of that Corporation? A. Yes.

Q. You are a member of the Bar, Mr. Blum? A. I am.

Q. Mr. Blum, there is now no Culver Export Corporation, is that right? A. That is correct.

Q. In 1932-1933 you were secretary of Culver Export Corporation? A. That is right. 1964

Q. And held no position with Loew's, is that right? A. That is right.

Q. But your present post is with Loew's? A. That is right.

Q. Mr. Blum, had you personally anything to do, yes or no, with the organization of the various corporations that are subsidiaries of Culver Export Corporation? A. Yes, with the legal end of it.

Q. Have you a list of those corporations? A. I believe Mr. Cohen has that.

The Special Master: When you say there is no Culver Export Corporation now, what do you mean? 1965

Mr. Pollak: It is liquidated.

The Special Master: And all these foreign interests are held by Loew's direct?

The Witness: That is right.

Q. As of the present date? A. Yes.

Q. When was Culver Export Corporation liquidated?

A. I think it was September 30, 1936.

Q. Will you state in general terms the purpose of the liquidation of Culver Export Corporation?

David Blum—for Defendants—Direct.

1966

Mr. Driscoll: Objected to. The fact is what we want, and not the purpose. This was 1936. I do not see any reason for going into the underlying purpose.

The Special Master: I don't suppose it has anything to do with this case.

Mr. Pollak: The liquidation was not directly related to this case.

Mr. Driscoll: That is a statement of a conclusion.

1967

Q. Mr. Blum, I show you a list of the corporations formerly subsidiaries of Culver, now subsidiaries since the latter part of 1936 of Loew's, and I ask you if this list was prepared under your supervision (handing papers to the witness)? A. Yes.

Mr. Pollak: I offer this document in evidence, if your Honor please.

(The papers just offered were received in evidence and marked respectively Defendants' Exhibits No. 28-A, 28-B, 28-C, 28-D, and 28-E, of this date.)

1968

Q. In some instances the corporations listed on Defendants' Exhibits 28-A to 28-E are incorporated in New Jersey? A. Some New Jersey, some Delaware, some native corporations abroad.

Q. By "native abroad" you mean incorporated in the foreign countries? A. Yes.

Q. Of the corporations incorporated in one or the other of the foreign states, what is the status of those corporations where they are located? A. It is domestic in the foreign country just the same as a New Jersey corporation is domestic in New Jersey.

Q. The corporations listed on Exhibit 28 are either domestic corporations of the countries in which they

David Blum—for Defendants—Direct.

operated, or are domesticated in those countries? A. That 1969
is correct.

Q. And that was true in 1932? A. That is right.

Q. Will you explain, Mr. Blum, the reasons for the organization of the corporations, either domestic to the countries of operation or domesticated in those countries?

Mr. Driscoll: Objected to as immaterial and irrelevant.

The Special Master: I do not know what he is driving at, but go ahead.

Mr. Pollak: To answer these attacks on the whole set-up of Culver Export Corporation.

Mr. Driscoll: The reason for it wouldn't explain it. 1970

Mr. Pollak: If your Honor please, on no theory is there liability for distribution abroad by corporations of this character which are not parties to this law suit.

The Special Master: That is a question of law, and it is admitted that all of these corporations are wholly owned by the parent.

Mr. Pollak: The question in that situation, as I read the decisions, especially the decisions we mention in our brief, is the question whether these corporations are created separately for bona fide reasons. 1971

The Special Master: I don't think there is any question about that, that they incorporated these corporations because it was the best way they could do business.

Mr. Driscoll: I do not think there is any question about that,—these incorporated in 1927-1928, long before this play was written.

Mr. Pollak: I think, in view of Mr. Driscoll's concession, we will not press that.

David Blum—for Defendants—Cross.

1972 By Mr. Pollak:

Q. Do you know whether these corporations have separate minute books? A. Yes, that is right.

Q. And bank accounts? A. Certainly.

Q. Each has its own managing agent, is that right? A. Yes.

Q. Who is a resident of the country in which the company operates? A. Yes.

Q. Who is paid by that corporation? A. That is right.

Q. Is the activity of each company geographically limited in accordance with the fourth column of that exhibit?

1973 A. The fifth column. Yes, each company is limited to the country shown in the fourth column.

Q. In no instance do two companies operate in the same territory, is that correct? A. That is correct.

Mr. Pollak: We have some specimen minute books here, but I don't think there is any need to offer them.

Cross examination by Mr. Driscoll:

Q. Prior to the 30th of September, 1936, these corporations came directly under the Culver Export Corporation?

1974 A. By that you mean the stock ownership?

Q. What was the situation? A. Either legally or equitably owned.

Q. What was the stock ownership prior to September 30, 1936? A. That is what I meant to answer. The stock was either legally or equitably owned by Culver Export Corporation.

Q. In 1936 you dissolved the Culver Export Corporation, and they were taken over direct by Loew's Incorporated? A. That is right.

Q. As a matter of fact they dissolved a great many

David Blum—for Defendants—Cross.

other subsidiaries of Loew's Incorporated? A. Not abroad, 1973
and that is the only thing I am familiar with.

Q. You are not familiar with the fact that they dissolved other subsidiaries? A. I heard something of that, but that is not within my line of duty.

Q. Do you know whether they dissolved the Distributing Company? A. I don't know.

Q. The Producing Company? A. I have no knowledge of that.

Q. Let us look at this list here, Exhibit 28, you have produced. I see the name David O. Decker as president of a number of these corporations, in fact more than anyone else. Mr. Decker, I believe, is a lawyer? A. That is right. 1976

Q. He is one of Mr. Cohen's co-workers? A. Yes.

Q. Mr. Cohen's buddy in the legal department and working under the supervision of Mr. Rubin, general counsel of Loew's Incorporated? A. That is right.

Q. And Mr. David O. Decker is president of Metro-Goldwyn-Mayer Company of Brazil operating in Brazil, and has his office in the Loew Building, up here on 47th Street and Broadway? A. 46th Street and Broadway.

Q. And Mr. Decker is the president of the Argentine Company and of the Brazil Company and of the West Indies Company and of the Chile Company and of a great many of the other companies? A. Yes. 1977

Q. Charles E. Quick, where does he make his office? A. Same place.

Q. Is he in the legal department of Loew's Incorporated also? A. No, he is not.

Q. What department is he in? A. Accounting department.

Q. He is an accountant? A. Yes.

Q. He is Vice-President of a number of these companies throughout? A. Yes.

David Blum—for Defendants—Cross.

1978

Q. Then we have Miss Len Cohen. Miss Cohen is treasurer of some of these companies? A. Yes.

Q. And she makes her office at 46th Street and Broadway in the Loew State Theatre Building? A. Yes.

Q. As treasurer of the Argentine company and as Treasurer of the West Indies company and as treasurer of the Chile company and as treasurer of the Hong Kong company she makes her office in the Loew State Theatre Building at 46th Street and Broadway? A. Yes.

1979

Mr. Pollak: We concede that Miss Len Cohen makes her office at 46th Street and Broadway, 1540 Broadway, and that applies to each of these companies which you seem to enjoy reading off.

Mr. Driscoll: Well, let us see. Miss Lillian Reiss. I suppose the concession extends to her too?

Mr. Pollak: Yes.

Q. She was assistant secretary of Culver Export Corporation, wasn't she? A. Yes.

Q. You were the secretary of the Culver Export Corporation. Are you an officer of any of these foreign corporations? A. No. You mean, was I an officer.

Q. These are still in existence, on Exhibit 28, aren't they? A. Yes.

1980

Q. Who was Mr. Davis? Is he up at Loew's Building too, M. I. Davis? A. No.

Q. He is down in South Africa? A. He is a resident in South Africa.

Q. Mr. David O. Decker and Miss Len Cohen and Mr. Charles E. Quick are the board of directors, although Mr. Davis is the local manager, acts as manager? A. Manager director.

Q. Any other ones you want to direct my attention to? Rumania? A. When we have a corporation native of that foreign country, the laws of that country would require

Robert L. Giffen—for Defendants—Direct.

us to have native directors; Roumania would be one of those corporations. 1981

Q. It would be correct to describe these as a nest of corporations having their offices in Loew's State office building? A. Yes, wherever these were corporations having offices in that building.

ROBERT L. GIFFIN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

1982

Q. What is your address? A. 152 West 42nd Street, New York City.

Q. What is your occupation, Mr. Giffen? A. Play broker, plays and literary material.

Q. That is, you dispose of literary material for clients, is that right? A. Yes, principally for pictures.

Q. By the way, you are testifying under subpoena, Mr. Giffen? A. Yes, I am.

Q. Was your occupation the same in 1931 and 1932? A. Since 1915.

Q. What is the name of the agency with which you are connected? A. It is known as Alice Kauser.

1983

Q. And you and Miss Kauser are partners? A. We are partners in a part of the business. She conducts the business of selling plays for production on the stage entirely in her own capacity.

Q. And your own function is what? A. Handling the picture rights.

Q. Handling the motion picture rights? A. And some literary rights in addition to that, and now and then disposing of a play for a client of mine if the picture department wants me to do it.

Robert L. Giffen—for Defendants—Direct.

084 Q. In 1931-1932 you mostly handled motion picture-rights yourself? A. Yes.

Q. Did you have among your clients one of the plaintiffs in this action, Mrs. Barnes? A. Yes.

Q. You did not, I suppose, personally meet Mr. Sheldon in that connection? A. No, I did not meet Mr. Sheldon in that connection.

Q. Did you have anything to do with an attempt to dispose of the motion picture rights to the play Dishonored Lady? A. Yes.

Q. Would you tell us in your own way what you did?

085 Mr. Driscoll: May I ask the object of this proof? It seems to me we are wasting a lot of time.

Mr. Pollak: The object of this proof² is to show two things. First, that the sale price of \$30,000 for the motion picture rights that Mrs. Barnes testified she hoped very much to get, was a reasonable price, was the best price that could be got, and also was a reasonable price. It bears directly on the cardinal question in the case, your Honor.

086 Mr. Driscoll: I do not get the object of it. Is it for the purpose of disputing \$30,000 as the amount of damages, or is it for the purpose of disputing the price? It certainly has nothing to do with the profits nor the ascertaining of profits nor solving the problem referred to the Special Master. If it has to do with the damages then you are not disputing that \$30,000 was the contract price?

Mr. Pollak: Certainly not. We are saying that the damages, which is one of the items that the Master on any theory must report, was \$30,000. We are also saying that in this case that the damages are the proper measure of recovery, that under the discretion vested in the Master under Section 25-b, whether to award the actual profits or dam-

Robert L. Giffen—for Defendants—Direct.

ages in some different amount in lieu of profits, 1987
the showing in this case is that the award should
be of damages, and that also is the point of this
testimony, that the measure of damages is \$30,000,
and that the award should be for damages and
not profits. And in that connection I may men-
tion the fact that in so far as our research has
gone, and in so far as research on either side has
gone, there has been no case of motion picture in-
fringement fought through to final decree in which
the award has been otherwise than as an award
of damages.

The Special Master: Let us not argue all that.

Mr. Driscoll: I am objecting to it. When my 1988
opponent says the Master has discretion, the order
directed the Master to take testimony. It does not
say there is an option. We get damages and profits;
that is the decree.

The Special Master: What I say is, don't let us
get into that argument now. Let us go ahead and
take this testimony, on objection if you will. You
are objecting to it?

Mr. Driscoll: I am objecting to it.

The Special Master: Overruled.

Mr. Driscoll: Exception.

Q. (Read by the stenographer, as follows:) Would you 1989
tell us in your own way what you did? A. I don't know
how extensive that would be in scope, but when the play
was produced at the Empire Theatre the attention of the
principal picture-producing companies was called to the
play and they all asked to have someone see it, although
that was not necessary because it was the practice of all
of the picture companies to send a representative to attend
the performance of any play that is produced on Broadway.
They were always in search of Broadway material for pic-

Robert L. Giffen—for Defendants—Direct:

1990 tures and while they needed no urging to attend that performance, yet it was a practice to notify them before the opening of the play that the play would open on such date; and whoever was the agent for the play was the one who was handling the picture rights. That was done in this case. Then when the reports were in, solicitations were made from day to day; then they were provided with manuscripts, and everything was done that could be done to accelerate a sale.

1991 The producing manager, Mr. Gilbert Miller, also interested himself in directing motion picture attention to the play and, I think, was the first one to send out a manuscript. I think he sent a manuscript to Mr. Rubin of Metro almost immediately after the production of the play. Whether he sent any to other managers or not I do not know. I presume he did. But I did not send out any manuscripts immediately, until I got some of the reactions of the principal people on its picture value. That meant a personal contact with practically all of the important members of the producing organizations which had the purchase of material in charge.

1992 That kept up from day to day until it developed that there was a very strong opposition to the production of the play as a picture, on the part of what we call the Hays organization, the Motion Picture Producers and Distributors of America. They placed what we call the ban on the play because of what they considered certain moral infraction.

Metro was very much interested in purchasing the rights, but could not do so in the face of this opposition of the Hays office. They tried to get that removed, but were not successful in doing so.

Quite some time went by. I went myself to the offices of the Hays organization and talked with Mr. Trotta. Is that his name, Arthur?

Robert L. Giffen—for Defendants—Direct.

Mr. Driscoll: I don't know.

1993

Mr. Clarke: Trotta, I think.

A. (Continued.) He was in charge of that division of the censorship of the Hays office. I don't suppose I should say censorship. It was action taken by the Hays office through a consent that the motion picture companies had given to what the Hays office has prescribed as a code, a moral code. Mr. Trotta said the verdict of the organization was directly against the production of the play because of certain features of it.

Q. That is, its production as a motion picture? A. Yes. The play had then been running for some time on the stage:

1994

At a second interview I asked Mr. Trotta to tell me the features of the play that were in question with the Hays organization so that we might have some guide in endeavoring to ameliorate the situation. There was, I understood, a practice in the Hays office that when a play was questioned, that if it could be arranged that if the objectionable feature could be removed and yet the company produced the play, it could be done with the understanding that the original title could not be used, and some other things. I said, "Several people are interested in this play; Metro wants to buy it; the author and manager want to sell it. We will see if we can't have a treatment made that will bring the play within your special requirements."

1995

Mr. Trotta said, "We can't tell you that; we can't tell you what you have to remove and what can stay in and what must come out."

I said, "What can I do to meet your requirements if someone doesn't tell us?" He said, "The code speaks for itself. You will have to be guided by that." I said, "That leaves us still working in the dark. We are not any further along than we were in the first place." He said, "Get the best treatment you can and we will see what we can do."

That treatment was put up to the authors, Mr. Sheldon

Robert L. Giffen—for Defendants—Direct.

1996 and Mrs. Barnes, through Mrs. Barnes, because Mr. Sheldon could not very well be reached because he was ill, and they then made a treatment. That treatment was submitted to the Metro, Metro having signified its intention of going through with the purchase if this treatment was satisfactory; but it was not. They had, in making the treatment, eliminated what they thought was the objectionable material, but it had very largely emasculated the dramatic value of the story and it was not satisfactory to Metro at all.

So finally, this was a year later, in the spring of 1931, contracts were finally drawn for the sale of the rights to Metro at a price of \$30,000. Those contracts were drawn and they were signed by Mrs. Barnes. Am I right about this, Arthur?

Mr. Driscoll: Yes.

A. (Continued.) Mrs. Barnes, the Charles Frohman Incorporated which had an interest through Guthrie McClintic in whose name the production contract originally stood, by Guthrie McClintic, and delivered to Mr. Rickerton who was the arbiter under the basic agreement, with a letter signed by these various people—I think it was just a letter—stating that he was to deliver the contract to Metro on the payment of \$30,000; that to be predicated upon the ability of Metro to secure the permission of the Hays office to make the production. They were given thirty or sixty days or some such time to do it.

Mr. Pollak: Those papers are in evidence, you will recall.

A. (Continued.) They were not able to do it, so that the trade fell through, and what was done with the contracts I don't know. I presume they still remain in the archives of the arbiter.

Robert L. Giffen—for Defendants—Direct

Q. Tell who the arbiter is. A. He was a sort of judge directly appointed by the Dramatists Guild and the Producing Managers Association. That was all of the Broadway managers. In fact, no manager could produce a play who was not a signatory of the agreement, and no author could sell one who was not a member of the Dramatists Guild. In a long and somewhat abstruse document, the arbiter was the umpire on motion picture sales. He had the final voice. It was his function to deal with the motion picture companies, with the authors and with the managers. At that time under the old basic agreement the managers and authors each owned fifty per cent interest in the motion picture rights, provided the manager had produced the play for three successive weeks in New York, then they were given 50-50 participations.

The basic agreement specified the manner in which motion picture sales should be made. The arbiter's function was to harmonize all differences, and final voice if that became necessary. He was kept advised of all motion picture negotiations in connection with any play that was produced. As soon as three weeks had gone by and the manager's rights were established, he had an equal voice in the decision as well as an equal share in the proceeds. Under the present agreement he does not have it. The arbiter, if there was a question as to price, if the author thought one price should be obtained and the manager was willing to accept a lower price, it was up to the arbiter to harmonize those differences, or if they could not agree to himself decide; he had the absolute power to decide. He could make a sale, if necessary, in spite of either of them. He then made all of the contracts. All contracts were submitted to him and he attended to the actual interchange of the contracts, the collection of money and the payment of money to the respective interests. He was allowed under the basic agreement a certain percentage for his services, which was deducted from the agent's commis-

1999

2000

2001

Robert L. Giffen—for Defendants—Direct.

2002 sion and it was always set forth in the contract, but the money was handled by the arbiter, and also the contract, so that when these contracts were drawn and signed they were delivered to the arbiter, Mr. Buckerton, who is unfortunately not with us any more, and it all depended on whether Metro could secure the authorization for the purchase from the Hays office before the deal could be closed. When it was not forthcoming, it failed.

Q. Was the figure of \$30,000 put up to the arbiter? A. Yes.

Q. And approved by him? A. Yes, approved by all of the parties concerned. If it had not been he would have immediately contacted them and tried for a compromise. 2003 It was only a question of going ahead and closing the trade, which for those reasons could not be done.

Q. It was satisfactory to Mrs. Barnes? A. Yes.

Q. And satisfactory to Frohman organization? A. Yes, and to Guthrie McClintic. McClintic had the original production contract. He had some kind of arrangement with Charles Frohman Inc. I don't know what it was, but anyway Charles Frohman Inc. had to be a party to the contract.

Q. Did you try to dispose of the motion picture rights to other persons than Metro? A. Yes.

Q. Do you recall what producers you tried?

2004 Mr. Driscoll: Objected to as immaterial, having nothing to do with the issues.

The Special Master: I don't think that has much to do with the issues.

Mr. Pollak: I want to show that the \$30,000 price was established after full negotiations.

Q. I will put it this way. In view of the testimony that we have, was the \$30,000 price the best price you received from anybody? A. It was the only actual price that we had from anybody.

Mr. Pollak: You may cross examine.

Robert L. Giffen—for Defendants—Cross.

Cross examination by Mr. Driscoll:

2005

Q. Mr. Giffen, in the sale or attempted sale of motion picture rights of Dishonored Lady, there wasn't anything unusual or extraordinary about the situation, was there?

A. No, only the Hays proposition; that doesn't often occur.

Q. What happened in the sale of that might happen in the sale of any other? A. Yes, with the exception of the Hays angle.

Q. And the effect of the Hays ban was to put hurdles in your way? Isn't that right? A. Yes.

Q. Also the effect was to lower the price of the motion picture rights? A. Yes.

Q. It was the Hays ban that held us up from the time of production in January 1930 to April 1931? A. That was the principal objection.

2006

Q. During all those sixteen months the matter was under consideration by Metro and negotiations were had back and forth, isn't that true? A. That is true. I wouldn't say that they were continuous; they were spasmodic.

Q. More alive at some times than at others? A. Yes.

Q. As a matter of fact, Metro procured on the initiative of Mr. Rubin a copy of this manuscript the day after the play opened in New York? A. That I don't know.

Q. You do know they did procure a manuscript? A. Yes.

Q. A day after the play opened in New York? A. I don't know when they got it.

2007

Q. And it had a New York run that lasted through the summer time? A. Yes.

Q. And then it went on the road for the rest of the year? A. Yes.

Q. It was produced in London? A. Yes, not with Miss Cornell.

Q. The play was produced in London? A. Yes.

Q. Mr. Sheldon was one of the outstanding playwrights? A. He had been more or less inactive for some time on

Sidney R. Fleischer—for Defendants—Direct.

2008

account of his physical disabilities. Prior to that he had been the outstanding American playwright until he became physically incapacitated. After that most of his work was done through collaboration. His brain was active, and is today, but he was not able to do the writing.

Q. He was then and is now a bedridden invalid? A. Yes.

Q. His work, so far as ~~any~~ writing was concerned, he had to work with a collaborator? A. Yes.

Q. Mr. Sheldon's record as playwright goes back to his undergraduate days at Harvard? A. Yes. He was a member of the Baker's Dozen there, and while he was there he wrote one of the two most important plays.

2009

Q. That is "Salvation Nell"? A. Yes.

Q. That was played by Mrs. Fiske for a number of years, five or six years? A. Yes. That was a great success.

Q. And he wrote that before he graduated from college? A. Yes.

Q. He had written a number of other outstanding successes, such as Romance, a play with Doris Keene; Lulu Betts; Song of Songs. He wrote The Jest— A. He adapted it from the Italian play, and Song of Songs was adapted from Sudermann's novel.

Q. As a matter of fact he has more successful plays to his credit than any American playwright, with one or two exceptions; is that right? A. I think that can safely be said.

2010

Mr. Driscoll: That is all.

Mr. Pollak: That is all.

SIDNEY R. FLEISCHER, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Q. Where do you reside? A. 120 Riverside Drive, New York.

Sidney R. Fleischer—for Defendants—Direct.

Q. What is your occupation? A. Attorney at law.

2011

Q. What was your occupation in 1931 and 1932? A. An attorney.

Q. Mr. Bickerton was mentioned in the testimony. Mr. Bickerton is dead? A. Mr. Bickerton is dead. I was associated with him since 1919.

Q. In this post as arbiter? A. Mr. Bickerton held the post of arbiter.

Q. You were his legal adviser? A. I was his associate. He was also an attorney.

Q. Will you explain, if you wish to add anything to what Mr. Giffen has said, what is the status of Mr. Bickerton as arbiter, what he had to do with the fixing of motion picture rights values?

2012

Mr. Driscoll: I can't see where taking the time for this is justified.

The Special Master: I think it is pretty clear.

Q. You heard Mr. Giffen? A. Yes. It would be repetitions, with just one slight modification. The arbiter has no power to sell a picture at a price less than that fixed by both author and manager. He may sell it for less than that fixed by the author. That is the only modification I might have of Mr. Giffen's testimony.

Q. Were you familiar with the case of Dishonored Lady when it occurred? A. I was not familiar at the time. I may have since.

2013

Q. You were familiar with the play? A. Yes.

Q. You were familiar with the prices current in 1932 for motion picture rights, is that correct? A. Yes.

Q. And for a period both before and after 1932? A. Yes.

Q. Are you prepared to give your estimate of the fair value of the motion picture rights of Dishonored Lady in 1932, just yes or no? A. Yes.

Q. What would you say the fair value was?

G colloquy of Counsel.

2014

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Objection sustained. I don't think that is of any value. You have introduced evidence to show negotiations between these various parties, in which mention was made of the figure \$30,000 under certain circumstances. That is the best evidence of what the parties thought at the time.

2015

Mr. Pollak: I think it is the best evidence, but I think it is proper to show what the market value was. There is, of course, the admission by Mrs. Barnes in her testimony that she hoped very much to get that figure. But it is perfectly proper to show reasonable value.

The Special Master: This evidence is what those people thought at that time.

Mr. Pollak: It is purely theoretical. I think I certainly should prove what the reasonable value of the motion picture rights was. I think it is important. We have proved it but we would like to verify it.

The Special Master: Go ahead.

2016

Mr. Driscoll: Look at the foolishness of it. In the first place the burden of proof of damages is on us. I think the burden of proving profits is on them. We have not offered any proof as to the damages other than this figure of \$30,000. They are wasting a lot of time.

Mr. Pollak: We think we have a right to this proof.

The Special Master: You don't doubt that the burden of proof of the damages is on the plaintiff?

Mr. Pollak: I think that the burden of proving damages is in the plaintiff.

The Special Master: Why in the world are you

Sidney R. Fleischer—for Defendants—Direct.

bothering with it? He has not introduced any other evidence. 2017

Mr. Pollak: What he is trying to do is to shunt off the proof of damages. He knows the damages are trifling compared with the profits.

Mr. Driscoll: I want both.

The Special Master: He wants both. Whether or not he is entitled to them is a question of law.

Mr. Pollak: As a matter of fact, you have discretion under section 25 to make an award of damages and not an award of profits.

The Special Master: Suppose I do. The only testimony and evidence before me is \$30,000.

Mr. Pollak: Yes; but your Honor understands that the strict legal theory is that the reasonable value of a thing is value in the market, which is not absolutely determined by the negotiations of the parties. 2018

The Special Master: I haven't anything else before me.

Mr. Pollak: I will withdraw this question. In view of the statement of counsel, I will withdraw the question, and leave the issue as to the measure of damages where it stands. I have some other questions to ask this witness.

By Mr. Pollak: 2019

Q. Mr. Fleischer, you are testifying under subpoena?

A. Yes.

Q. Have you a schedule of prices paid for motion picture rights in the year 1932? A. Yes (producing paper).

Q. That schedule which you have with you correctly sets forth the prices of motion picture rights for the year 1932?

A. Motion picture sales.

Q. It also gives data concerning the length of run of plays of which the motion picture rights were sold, is that right? A. I have another schedule here, which was fur-

Sidney R. Fleischer—for Defendants—Direct.

2020

nished to me, which was made up by Mr. Ligon Johnson in whom I have great faith and which I am willing to accept as authentic.

Mr. Pollak: Is there objection to the competency of that schedule by Mr. Johnson?

Mr. Driscoll: Yes, and to the materiality and relevancy.

Q. Stick to the schedule that you have prepared, of motion picture sales. A. Yes.

2021

Mr. Pollak: I offer it in evidence as bearing directly on this point, first, the exercise of discretion by the Court whether to award damages or to award profits, and secondly, on the question what award would be awarded of just damages in lieu of the actual damages and actual profits.

The Special Master: I am going to accept it over the objection of Mr. Driscoll, because you seem to attach great importance to it.

Mr. Driscoll: I think I ought to take a moment to emphasize the fact in the record that this directly brings up the question whether or not the Special Master has any authority whatever to do otherwise than as directed by the decree of the Circuit Court, or of the District Court, supplementing the mandate of the Circuit Court, namely, to find out the actual damages and find out the profits. It is not offered for either one of those two purposes. He clearly states that it is offered on the theory that you have some discretion to decide whether we shall have statutory damages or for damages plus profits. And so since it is offered directly on that question, on that question solely, I want it pointed out that we object to it very strenuously, and I want my objection to appear at length on the record.

2022

The Special Master: All right. I think we will take it anyway. Your objection is very clear, and I

Colloquy of Counsel.

think it will save time and preserve the rights of everyone if I take it under objection. 2023.

The Witness: I want to make one statement in regard to this paper. The arbiter is committed to confidence in respect to the prices at which pictures are sold, at the request of the picture companies, the producers and the authors. I am producing it now under subpoena, and I should like it understood that it be held under as great confidence as possible under the circumstances, that these prices be not revealed and no publicity be given to it, and that that be held by the Special Master for his own use, and of course within the points of possibility of the case, kept away from anyone not directly authorized. 2024

The Special Master: All I can say is that it will not be published by me.

The Witness: If they will be held where they are not available to anyone, that is all I can ask.

(The paper just offered was received in evidence and marked Defendants' Exhibits 29-A and 29-B of this date.)

Mr. Driscoll: There are no copies of that exhibit available. It will save time here if the stenographer copies it into the record.

Mr. Pollak: Then we can return the document to you. 2025

(The document just marked Defendants' Exhibits Nos. 29-A and 29-B, reads as follows:)

"1932

Date 1932	Name of Play	Sales Price
January 18th,	Society Girl	\$ 22,500
" 23rd,	Dr. X	5,000
" 25th,	Congai (option)	2,500

Exhibits Read into Record.

2026	Date 1932	Name of Play	Sales Price	
	February 8th,	Precious	8,000	
	" 9th,	Reunion In Vienna	85,000	
	March 5th,	Whistling In the Dark	50,000	
	" 7th,	Blessed Ewent	66,000	
	" 18th,	Wild Waves	25,000	
	" 19th,	Harlem	5,500	
	" 24th,	Counsellor At Law	75,000	(plus royalty)
	April 1st,	Barretts of Wimpole Street	80,000	(plus royalty)
	" 4th,	Life Begins	6,000	
2027	" 4th,	The Inside Story	10,000	
	" 8th,	Trick For Trick	20,000	
	" 9th,	Brief Moment	10,000	(plus royalty)
	" 14th,	Riddle Me This	35,000	
	" 19th,	Animal Kingdom	50,000	
	" 25th,	Decency	500	
	" 29th,	Cross Roads	8,000	
	June 2nd,	Merry Go Round	10,000	
	" 28th,	Good Earth, The	100,000	
	August 25th,	Congai (sale)	12,500	
	October 18th,	Lilly Turner	15,000	
2028	" 22nd,	Diamond Lil	25,000	
	" 26th,	Clear All Wires	40,000	
	" 29th,	The Warriors Husband	17,500	
	November 12th,	I Loved You Wednesday	22,500	
	" 12th,	Another Language	37,500	
	" 16th,	Men Must Fight	15,000	
	December 16th,	Rendezvous	6,000	
	" 16th,	The Great Magoo	22,500	
	" 19th,	Chrysalis	30,000	
	" 21st,	Berkeley Square	30,000	

Total \$947,500.00

32 Plays Sold

(1 option not asserted)

Testimony Offered from Trial Record.

Mr. Pollak: There is no cross examination?

2029

Mr. Driscoll: No.

Mr. Pollak: May I bring out the fact that Mr. Fleischer himself is now the arbiter. I do not think that is on the record.

(The Testimony of Thalberg was designated Reference No. 9.)

I offer in evidence, from the prior printed record the testimony of Mr. Irving Thalberg, appearing at P.P.R. pages 73 to 81, his entire testimony both direct and cross.

Mr. Driscoll: I want to object to that as immaterial and irrelevant, nothing to do with the issues.

2030

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Stromberg was designated Reference No. 10.)

Mr. Pollak: I offer in evidence the testimony of Mr. Hunt Stromberg from the prior record, both direct and cross, which appears at P.P.R. pages 81 to 114.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Meehan was designated Reference No. 11.)

2031

Mr. Pollak: I offer in evidence the testimony of Mr. John Meehan, both direct and cross, which appears at P.P.R. pages 114 to 131.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Brown was designated Reference No. 12.)

Mr. Pollak: I offer in evidence the testimony of Mr. Clarence L. Brown, both direct and cross, which appears at P.P.R. pages 131 to 139.

Testimony Offered from Trial Record.

2032

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Tuckock was designated Reference No. 13.)

Mr. Pollak: I offer in evidence the testimony of Miss Wanda Tuckock, which appears at P.P.R. pages 140 to 142.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Marx was designated Reference No. 14.)

2033

Mr. Pollak: I offer in evidence the testimony of Mr. Samuel Marx, both direct and cross, which appears at P.P.R. pages 142 and 143.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Schley was designated Reference No. 15.)

Mr. Pollak: I offer the testimony of Mrs. Edna Schley from the prior record, both direct and cross, P.P.R. pages 144-146.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

2034

Mr. Pollak: Mr. Master, here is an exhibit showing the officers and directors of the corporations enumerated in Defendants' Exhibit L-1, that is that long list of Loew corporations, corporations in which Loew's Incorporated has interests. I think Mr. Driscoll has a copy of it.

(The paper just produced was marked in evidence as Plaintiffs' Exhibit No. M, of this date.)

Mr. Pollak: It is stipulated that if Mr. Ligon

Testimony Offered from Trial Record.

Johnson were called as a witness he would testify that he is an attorney at law, that he is concerned with copyright transactions in plays and was so concerned in the year 1932 and about that year; that he would testify with respect to the play "Society Girl" appearing in Defendants' Exhibit 29-A as stated in this letter from Ligon Johnson dated July 14, 1937, addressed to Mr. Samuel D. Cohen. (Letter produced.) 2035

(Discussion off the record.)

Mr. Pollak: No objection is taken on account of the nonproduction of the witness.

Mr. Driscoll: No. I will stipulate that if he were called he would testify as set forth in the exhibit, to be marked. 2036

Mr. Pollak: There is no objection to his competency as distinguished from the competency of the testimony?

Mr. Driscoll: As to his competency as an expert?

Mr. Pollak: Yes.

(Discussion off the record.)

Mr. Driscoll: I thought this was not to be expert testimony. This is not going in as hearsay or anything like that. He has written in this letter that such and such a play opened at such a time and ran for so many weeks. Presumably he knows what he is talking about. 2037

(Discussion off the record.)

Mr. Cohen: This information was taken from his records.

The Special Master: Mark it for identification.

Mr. Driscoll: Mark it for identification, and I will stipulate that if he were called as a witness he would testify to the contents of that statement.

Mr. Pollak: But you object to its competency and relevancy.

Testimony Offered from Trial Record.

2038

Mr. Driscoll: Yes.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

(The letter just referred to was marked Defendants' Exhibit No. 30 for Identification, of this date, and reads in part as follows:

[Letterhead of]

LIGON JOHNSON

Attorney at Law

1619 Broadway

New York

2039

Ligon Johnson

John G. Tarrant

July 14, 1937

Mr. Samuel D. Cohen

Metro Goldwyn Mayer Pictures

1540 Broadway

New York, N. Y.

Dear Mr. Cohen:

2040

In reply to yours of the 13th inst. I am listing below the opening and closing dates of plays presented in New York requested by you and such data as the trade papers afford as to road showing, together with such information as is available from trade papers as to the success or failure of each from a box office standpoint:

[p. 8]

84 SOCIETY GIRL: Opened at Booth Theatre, Dec. 30, 1931, closed Jan. 16, 1932 after 22 performances.

Testimony Offered from Trial Record.

85 DOCTOR X: Opened at Hudson Theatre, Feb. 9, 1931 and closed Apr. 18, 1931 after 80 performances. Record of single stock presentation during 1930, which might have been a tryout during the summer of 1930 at Southampton.

2041

86 CONGAL: Opened at Sam H. Harris Theatre, Nov. 27, 1928 and going from there to the Longacre Theatre March 11, 1929 where it closed after a run of 17 weeks. Opened to very good business, later dropping to an average of \$15,000 and at the time of closing was around \$11,000.

87 PRECIOUS: Presented at Royale Theatre, opening Jan. 14, 1929 and closed after three weeks to poor trade at an estimated pace under \$4,000. Record of two stock presentations during 1929.

2042

88 REUNION IN VIENNA: Presented at Martin Beck Theatre, opening Nov. 16, 1931; moved to Guild Theatre May 23, 1932 where it closed July 2, 1932 after a run of 280 performances. Was considered quite a success. Presented in stock during the seasons of 1932 and 1933.

89 WHISTLING IN THE DARK: Presented at Ethel Barrimore Theatre, opening Jan. 19, 1932, and closing there May 21, 1932 after a run of 144 performances. A second presentation in New York was made at the Waldorf Theatre, opening Nov. 3, 1932 and closing there February 4, 1933 (123 performances). After New York run this play was scheduled for road tour. Numerous stock presentations during 1932, 1933 and 1934; also presented during the summer of 1935 and 1937.

2043

90 BLESSED EVENT: Opened at Longacre Theatre, Feb. 12, 1932 and closed May 21, 1932 after a

Testimony Offered from Trial Record.

2044

run of 124 performances. Had about a dozen stock presentations during season of 1932.

91 WILD WAVES: Opened at Times Square Theatre, Feb. 19, 1932, and closed March 10, 1932 after a run of 25 performances.

92 HARLEM: Opened at Apollo Theatre, Feb. 20, 1929; closed suddenly at the Times Square Theatre where the play had been transferred, in May 1929 after a 12 weeks' [p. 9] run. This play got around \$11,000 first month or so and averaged \$9,000 slipping to \$6,000 during the last week. Reopened Oct. 21, 1929 at the Eltinge Theatre; presented in Hollywood opening Oct. 7, 1932; also at the Empire Theatre, opening Oct. 27, 1932.

2045

93 COUNSELLOR AT LAW: Plymouth Theatre, opening Nov. 6, 1931 and closing July 16, 1932 after a run of 293 performances. Was considered quite a success. In addition to the road showing this play has had numerous stock presentation during 1933 and 1934.

94 BARRETTS OF WIMPOLE STREET: Opened at Empire Theatre, Feb. 9, 1931 and closed Feb. 13, 1932 after a run of 372 performances. Was very successful. Revival presented at the Martin Beck Theatre opening Feb. 25, 1935. Katherine Cornell toured the country and presented this play in her repertory.

2046

95 LIFE BEGINS: Presented at Selwyn Theatre, opening March 28, 1932; closed April 2, 1932 (8 performances).

96 INSIDE STORY: Presented at National Theatre, opening Feb. 22, 1932, and closed March 12, 1932 after a run of 24 performances.

Testimony Offered from Trial Record.

- 97 **TRICK FOR TRICK**: Opened at Sam H. Harris Theatre, Feb. 18, 1932 and transferred to the Geo. M. Cohan Theatre, March 14, 1932 at which theatre this play closed Apr. 16, 1932 after 70 performances. Single stock performance during 1932. 2047
- 98 **BRIEF MOMENT**: Presented at Belasco Theatre, Nov. 9, 1931 and closed Feb. 27, 1932 at the Cort Theatre, where it had moved Jan. 18, 1932 (128 performances). In addition to road showing, this play was presented in stock twice during 1932; once during 1933 and once during the summer of 1934. 2048
- 99 **RIDDLE ME THIS**: Presented at John Golden Theatre, opening Feb. 25, 1932 and closing May 21, 1932 after 100 performances. This play has been presented in stock during the seasons of 1932, 1933 and 1934; also during the summer of 1935 and 1936.
- 100 **ANIMAL KINGDOM**: Presented at the Broadhurst Theatre, opening Jan. 12, 1932 and closing June 18, 1932 (171 performances). This play was presented during 1932 (6 times) in stock; once during 1933 and during the summer of 1934.
- 101 **CROSS ROADS**: Morosco Theatre, opening Nov. 11, 1929 and moving to the Royale Theatre where it closed in Dec. 1929 after a three weeks' run (28 performances). Notices generally tinged praise with doubt. 2049
- 102 **MERRY GO ROUND**: Several plays have been presented in N. Y. under this title: 1; by Edgar Smith (book), music by Gus Edwards, presented at the New Circle Theatre, New York, opening Apr. 25, 1928; 2; Book and lyrics by Morrie Ryskind and Howard Dietz, music by

Testimony Offered from Trial Record.

2050

Henry Souvaine and Jay Gorwey; opening at Klaw Theatre, N.Y. C. May 31, 1927; 3; Play by Albert Maltz and Geo. Sklar, opening at Princetown Theatre, Apr. 22, and moving to Avon Theatre May 10, 1932 where it closed after 56 performances. This play had road showing. I believe you are interested in the last mentioned play.

2051

103 GOOD EARTH: Opened at the Guild Theatre, Oct. 17, 1932 and closed Dec. 3, 1932 (56 performances). This play was not considered successful but merely ran the length of the Theatre Guild subscription season. [p. 10]

104 LILLY TURNER: Presented at Morosco Theatre; opening Sept. 19, 1932, and closed Oct. 8, 1932 after a run of 24 performances. This play had a single stock presentation at Minneapolis in 1932. A presentation was offered in Cleveland under the title "Health is Wealth" in Nov., 1932.

105 CLEAR ALL WIRES: Presented at the Times Square Theatre, opening Sept. 14, 1932 and closing Dec. 3, 1932 after 91 performances.

2052

106 DIAMOND LIL: Presented at Royale Theatre, opening Apr. 9, 1928 and closing after a 40 weeks' run. This play averaged over \$15,000 weekly. Went on road tour after New York closing.

107 WARRIOR'S HUSBAND: Opened at Morosco Theatre, March 11, 1932, and closed May 21, 1932 after a run of 83 performances. Single stock presentation during summer of 1937.

108 I LOVED YOU WEDNESDAY: Opening at Sam H. Harris Theatre, Oct. 11, 1932, closed Dec. 3, 1932 after a run of 63 performances. Stock presentation in Chicago in May, 1934.

Testimony Offered from Trial Record.

109. ANOTHER LANGUAGE: Presented at Booth Theatre, opening Apr. 25, 1932 and closed Feb. 18, 1933 (348 performances). Reopened at the Waldorf Theatre May 8, 1933 and closed there July 15, 1933 after 80 performances, making a total of 428 performances. In addition to road showing, this play has had numerous stock presentations from 1932 to 1937. 2053

110. MUST MEN FIGHT: Presented at Lyceum Theatre, opening Oct. 14, 1932, and closing Nov. 12, 1932 (35 performances); few stock presentations; twice in 1932; once in 1933; once in 1934 and during the summer of 1935. 2054

111. RENDEZVOUS: Presented at Broadhurst Theatre, opening Oct. 12, 1932 and closing Oct. 29, 1932 (21 performances). Single stock presentation during 1933.

112. GREAT MAGOO: Presented at Selwyn Theatre, opening Dec. 2, 1932 and closing Dec. 10, 1932 (14 performances). Notices were not good.

113. CHRYSALIS: Presented at Martin Beck Theatre, opening Nov. 15, 1932 and closing Dec. 3, 1932 (23 performances). Single stock presentation during 1932. 2055

114. BERKELEY SQUARE: Lyceum Theatre, opening Nov. 4, 1929 and closing May, 1930 after a run of 28 weeks (227 performances). Held pace of \$19,000 weekly. Heat knocked it down to \$10,000. Several stock presentations during 1931, 1932, 1933; also during the summers of 1935, 1936 and 1937.

[p. 11]

Very truly yours,

[Signed] LIGON JOHNSON.]

Testimony Offered from Trial Record.

(The testimony of Hess was designated Reference No. 16.)

Mr. Pollak: I offer in evidence from the prior record of the testimony of Mr. Gabriel L. Hess, direct and cross, appearing at P.P.R. pages 59 to 71, and in that connection I also offer in evidence from the prior record (pp. 805-813) what is there marked as Defendants' Exhibit A, being a resolution of October 31, 1930, of Motion Picture Producers and Distributors of America.

(The aforesaid resolution was designated Reference No. 17 and was marked "Defendants' Exhibit R-7".)

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; nothing to do with the issues. The Special Master: Overruled.

Mr. Driscoll: Exception.

Mr. Pollak: I offer in evidence from this prior record Complainants' Exhibit 3, printed at P.P.R. pages 495 to 622 thereof. Dialogue continuity of "Letty Lynton".

(This continuity has already been designated Reference No. 6 and marked "Defendants' Exhibit R-4".)

Mr. Driscoll: We undoubtedly have that in the office. It is printed. You are offering that as an exhibit?

Mr. Pollak: Yes.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues referred to the Special Master.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Colloquy of Counsel.

Mr. Pollak: I have a statement to make, if your Honor please, about a matter affecting one exhibit, which just clarifies the record. 2059

The Special Master: Wait a minute. Perhaps he will admit it.

Mr. Pollak: Perhaps he will. I think it should go into the record anyway.

(Discussion off the record.)

Mr. Pollak: At page 451 of the record of New York testimony I stated, as appears in the record, that Exhibit 5, which was an early accounting of Culver Export Corporation on the 1932 basis, would be "amended". The fact, however, is that Exhibit 20, a later exhibit giving a full accounting of the Culver Export Corporation, was introduced. 2060

The item appearing in the last column of Exhibit 5 shows a series of print costs for foreign countries including Canada. Canada, while a foreign country, was, as you will recall, not a country covered by Culver Export Corporation. Excepting for the print costs for Canada, the item of print costs theretofore appearing in Exhibit 5 does appear in Exhibit 20 though not broken down by countries. For that reason and because there has been absolutely no controversy about this issue at all, it does not seem necessary to carry out the declaration that Exhibit 5 would be amended. 2061

This explanation is for the Master who in reading the record at that point would not understand what had become of that exhibit.

Let me state this, if you do not mind. It had been the intention of the defendants to introduce at the next hearing other witnesses on the point that the fair market value of the motion picture rights of Dishonored Lady was not in excess of \$30,000. But in view of the statement made by plaintiffs' counsel—

Charles Moskowitz—for Defendants—Direct.

2062

Mr. Driscoll: What was that statement? Let us get that on the record.

Mr. Pollak: In the objection to the testimony concerning the fair market value taken today and the disposition made following that statement by the plaintiffs' counsel, there seems no purpose in calling other witnesses on that point. They would testify substantially as Mr. Fleischer.

Mr. Driscoll: I am anxious to know what was the statement made by plaintiffs' counsel.

Mr. Pollak: As I understand it you do not claim that your actual damages were in excess of \$30,000.

2063

Mr. Driscoll: I am willing to make that statement now. I don't think I did before. The only proof that was in the record was the proposed contract between the purchaser and the author and the manager. But we are not claiming proof of actual damages in excess of \$30,000; never had.

(Hearing adjourned to September 23, 1937, at 10 o'clock A. M.)

HEARING OF SEPTEMBER 23, 1937.

2064

CHARLES MOSKOWITZ, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name, residence and occupation?

A. Charles Moskowitz, 8245 Beverly Road, Kew Gardens, Long Island; occupation, in charge of the operation of circuit of theatres for Loew's Incorporated.

Charles Moskowitz—for Defendants—Direct.

Q. Did you hold substantially the same post in 1932?

2065

A. Yes.

Q. Would you state in general terms your experience in the motion picture industry? A. I have been connected with the business for 24 years, all that time with the present company or its predecessor company. My general capacity for a great many years, particularly my duties for the past ten or twelve years, has been in charge of the theatres I mentioned.

Q. Among your activities and experiences, you are a trained accountant? A. Yes.

Q. And graduated as such? A. Yes.

Q. Mr. Moskowitz, would you state in your own way the general character of the services that the Marcus Loew Booking Agency performed in 1932? A. Marcus Loew Booking Agency help operate and supervise the operation of all the theatres, the so-called Loew theatres. The various departments that function in the operation of a theatre were paid for by Marcus Loew Booking Agency or Loew's Incorporated and not by the individual theatres, such departments as publicity department, sound department, projection department, ever so many that I could mention—

2066

Q. You can mention all of them. A. First, there is the accounting department, the film booking department, the film buying department, the theatre operating department, which would include supervisors and general operating heads and executive heads. I might add their construction and purchasing departments, that I think of.

2067

Q. By construction and purchasing you mean what? A. The purchasing department would buy any of the items needed by the theatre, in most cases having a big purchasing power, thereby buying cheaper than any particular theatre could buy.

Q. All of these things were true in 1932 and 1933, or true in substance? A. Yes.

Q. Mr. Moskowitz, the testimony discloses that the pic-

Charles Moskowitz—for Defendants—Direct.

2068 Sure "Letty Lynton" was exhibited in some one hundred, I think exactly 102, theatres, or thereabouts, connected in some way or other with the Loew chain. Your practice was to make, for services of the Booking Agency, a flat fee, was it not? Just yes or no. A. Yes.

Q. Will you state in general the considerations that determined the amount of the fee to be charged to each particular theatre?

Mr. Driscoll: Objected to. There isn't any testimony that Mr. Moskowitz is the one who determined the fee to be charged to each particular theatre.

2069 Q. Were you familiar with it?

A. Yes, thoroughly familiar.

Q. Did you participate in the determination of the general policy in fixing the fee?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

Q. Tell in your own way what you had to do with the determination of the charges. A. I had a great deal to do with determining the charges.

2070 Mr. Driscoll: Objected to as stating a conclusion.

Q. State as completely as possible what you had to do with it. A. It was easy for us to determine the cost of the home office, the district supervisor and the various charges. Those charges instead of being paid by the individual theatres were paid by this one company and charged at a proportion to each theatre by a weekly charge, such as the charge made during the engagement of "Letty Lynton". Those collections from the theatres were ap-

Charles Moskowitz—for Defendants—Direct.

plied against the expenditures.

2071

Our experience over a great many years helped us to determine the name or amount or size of those charges and our expenditures would govern those charges to the theatres. How much further you want me to go into detail, I don't know.

Mr. Driscoll: I move to strike out the answer. It has nothing to do with the issues tried here. The accounts show the moneys received and the moneys disbursed, and if there is anything further it ought to be done with figures and not by a general statement in this manner.

2072

Mr. Pollak: I may say this, that may simplify Mr. Driscoll's problem and obviate Mr. Driscoll's objection. As I understand the rule of law, the fact that expenditures were made is all that is relevant. My friend wants us also to show that the expenditures, which include a charge as you may recall of Marcus Loew Booking agency, are reasonable. If Mr. Driscoll concedes the reasonableness of the charges, that is all that is necessary.

The Special Master: Which is the schedule that includes the charges that you are talking about?

Mr. Pollak: L-6.

Mr. Driscoll: I endeavored to make clear, whether I made a point of it or not in this accounting here—

2073

Mr. Pollak: Is your point a criticism of the reasonableness of these charges?

Mr. Driscoll: I don't believe you are entitled to charge them at all.

Mr. Pollak: Do you claim they are unreasonable?

Mr. Driscoll: Any such charges are unreasonable, any amounts would be unreasonable.

Charles Moskowitz:—for Defendants—Direct.

2074

Mr. Pollak: I think, in view of what Mr. Driscoll states, that I should be permitted to go further.
 • The Special Master: So far as I can see, this witness is simply saying that these charges were made by the company.—

Mr. Pollak: By the Booking Agency.

The Special Master: —because in their experience over a period of years they believe them to be reasonable.

The Witness: And further, that these are not charges made at random. Individual theatres would have those expenses and probably more. By cumulative methods we are able to save considerably.

2075

The Special Master: I think it should be allowed.

By Mr. Pollak:

Q. Mr. Moskowitz, are you familiar with the general rates of charges for booking services as they existed in 1932?

A. Yes.

Q. Did you yourself have to do with the making of contracts with other producers for booking services? A. Yes, I did.

Q. In general terms, will you say what those other producers were? A. Practically every company, practically every film company in the business, Paramount, Warners, Fox, R-K-O, Republic.

2076

Q. Based on your experience with and knowledge of the charges current in 1932 and 1933 for booking services will you say whether in your opinion the charges made by the Marcus Loew Booking Agency were reasonable or not?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, and I object to the form of the question.

A. They were low.

Charles Moskowitz—for Defendants—Direct.

Mr. Pollak: He has testified that he was familiar with the actual contracts made by other producers, practically all of the producers, and so can testify that he made contracts with all of the producers.

2077

Q. Did you in the year 1932, yourself in behalf of your company or companies with which you were connected, make contracts with virtually all other producers?

Mr. Driscoll: What kind of contracts?

Q. For the distribution and exhibition of films? A. Yes.

Mr. Pollak: Now I ask for an answer to my question.

2078

Mr. Driscoll: You know, the ridiculous part of this is well illustrated by the charges that are made. My friend would establish a prevailing rate. You take this column; you will find charges as high as \$900 and as low as \$100. He would establish a prevailing rate.

Mr. Pollak: What we are bringing out here is the reasonableness of these charges—

Mr. Driscoll: By showing what somebody else charges.

Mr. Pollak: Just a minute. —which as the witness has said are based upon the particular situation of each particular theatre.

2079

The Special Master: Let him say what that basis is.

Q. Would you say a little more fully what your basis, on which you charge the particular theatre, is? A. Approximately three percent of the gross business spread over a period. May I ask a question? For example, we will take any particular theatre, take one of our neighborhood thea-

Charles Moskowitz--for Defendants--Direct.

2080

tres in New York. They need publicity men, they need exploitation, they need sound experts, they need projection experts; this particular theatre could not possibly by itself hire those people and pay for them out of its own business. Therefore Marcus Loew Booking Agency hires these people and spreads them all over, so that a man instead of working for one theatre works in a district, for a section of New York, Jamaica, Long Island, Richmond Hill. This man gets quite a good salary. His salary is paid by Marcus Loew Booking Agency. It must come out of the theatre in some form. The theatre reimburses that salary by these weekly payments, which are a small percentage of gross business.

2081

By the Special Master:

Q. You have figured out that those payments have amounted to three per cent. of the gross? A. About three per cent. of the gross. I will say that the total amount received by Marcus Loew Booking Agency does not net them a profit.

Mr. Driscoll: I will object to that and ask to have it stricken out.

The Special Master: Strike it out.

2082

Mr. Pollak: The rest of it stands. I think it is a clear explanation.

By Mr. Pollak:

Q. In connection with these theatres in 1932, did you also have to do with the construction and equipment of theatres and with the purchase of theatres, if they were purchased? A. Yes.

Q. Will you tell me in general terms what you had to do with the construction and equipment of theatres in 1932 and in the years before that? A. I supervised the opera-

Charles Moskowitz—for Defendants—Direct.

tion of the construction department and purchase department. 2083

Q. How long before 1932 had you done that? A. At least ten years before that.

Q. Mr. Moskowitz, will you tell us whether the general practice of your company was to build theatres or to buy them? A. To build theatres.

Q. Although you did in some instances buy them? A. Yes, in a few instances.

Q. In connection with the building of theatres, will you tell me what your practice was in regard to the control of the costs of construction—I mean always your company?

Mr. Driscoll: Is it the contention of the defendants that the defendants put up a number of theatres to show "Letty Lynton"? 2084

Mr. Pollak: It is not the contention of the defendants.

Mr. Driscoll: What is the object of this testimony?

Mr. Pollak: It is to show the reasonableness of the costs of construction and the correctness of the depreciation item on the Loew theatres.

The Special Master: Which exhibit and which column?

Mr. Driscoll: On the concession made by Mr. Pollak that no theatres were built to show "Letty Lynton", I want to offer the objection that the testimony is entirely incompetent, irrelevant and immaterial to the issues being tried here. 2085

Mr. Pollak: The point here is an issue of overhead. The exhibit is L-7, depreciation item.

The Special Master: What is the question?

(The pending question was read by the stenographer.)

Charles Moskowitz—for Defendants—Direct.

2086

A. After the plans and specifications are completed, bids are received from various contractors. In addition to the bids from contractors, our own construction department engineers measure up the quantities of the different materials that would be required in the building and know the costs of labor and materials. We estimate our own costs. The lowest bidder of the contractors, after a great deal of shopping, are usually awarded the contract. The purpose naturally was to buy as cheaply as we could. Most contracts would in addition have a saving clause. The contract would be let at an upset price and if there was a saving below that, usually 75 per cent. of it went to us and 25 per cent. went to the contractor, we reserving to ourselves the privilege of subletting some of the parts included in the general contract to such contractor as we might select if we should get a cheaper bid or lower bid than the general contractor would secure for such work.

2087

Q. Mr. Moskowitz, will you state in general terms what your practice was in regard to procuring equipment for the theatres? A. Bids are always secured for the purchase of our equipment. Quantity contracts are made where possible, such as by the purchase of electric light materials we get a discount of possibly 38 per cent. as against the average discount of ten per cent. if we bought for each particular theatre by itself; supplies for projection booth, we get the highest discounts in the business, 36 per cent., as against five or ten per cent. we could get if we were buying for any particular theatre. All of our purchases for building or equipment, no matter how small, are properly shopped and, in my opinion, are all at a very low rate.

2088

Q. That was true in 1932 and in the preceding years?

A. Yes.

Q. Mr. Moskowitz, you have said that in some instances you did buy theatres. Would you tell me in general what your practice was with respect to the fixation of the price

Charles Moskowitz—for Defendants—Direct.

at which you were willing to buy theatres when you were willing to buy theatres? 2089

Mr. Driscoll: I think this is altogether too general. I think we should get down to what happened in the particular case and not give any general policy as to buying theatres.

The Special Master: Let me get this straight in my mind. All this testimony relates to L-7, is that right?

Mr. Pollak: I think so, yes—and similar groups.

The Special Master: L-7 and L-8.

Mr. Pollak: You know we have sub-classified Loew's theatres, accordingly as they were owned wholly by one of the defendants or partly owned or owned through mediation of the various companies, and accordingly as Loew's was in some instances merely operating on a servicing contract. The principle is apparent. 2090

The Special Master: What you are trying to do is to justify the accounting of Loew's Incorporated?

Mr. Pollak: Yes.

The Special Master: In other words, you are trying to justify the last column on L-8, as the profit resulting therefrom that you allocate to Letty Lynton? 2091

Mr. Pollak: It is the ratable share of the overhead that appears on the L-6 and L-8 exhibits, that is, it is adduced from an analysis of overhead items.

The Special Master: What is Mr. Driscoll's position with reference to the final figure on Defendants' Exhibit L-8? Do you say it ought to be very much increased, or do you accept it, or what?

Mr. Driscoll: We do not accept it. In the first place we say they have no right to allocate one-third of the charges to others and two-thirds to "Letty

Colloquy of Counsel.

2092

Lynton"; we say there is no authority for giving two-thirds to "Letty Lynton" and giving one-third to someone else.

The Special Master: Do you question all of the itemized expenses that they set up in L-7 and L-8?

2093

Mr. Driscoll: I have not questioned their figures. I have not gone into any question of their figures, but I do deny their right to charge overhead to us in the operation of that theatre. I say in each theatre they have a right to charge against each week's receipts the direct charges of the operation. But when they go back to New York City and charge up part of the Loew Building against us and part of these salaries, I say they have no right to do that at all. They have the right to charge the direct cost of the operation of that theatre against that week's receipts. That is my position.

The Special Master: What does that refer to in the last analysis? I don't remember what you say in your brief about this.

Mr. Driscoll: It refers to the allocation of all these overhead charges.

The Special Master: I know about the production end of it. I mean as to the operations of these theatres.

2094

Mr. Driscoll: It applies more clearly to the operation of the theatres. That is my position. They have a theatre. They may have had a mortgage set up on that theatre or may not. It does not interest us. We were not responsible for that mortgage or anything of that sort. But they take a picture, which is held to be an infringement on our play, they take "Letty Lynton" and put it into that theatre for a week. They take in gross receipts of say \$3,000 or \$5,000 or \$10,000 or \$80,000 as in the case of the Capitol Theatre. We say they can de-

Colloquy of Counsel.

duct against that the cost of their music, the cost of other acts if they are on the bill, the cost of their manager, the cost of their ushers, and all of those direct charges against that week's business. They can deduct all of those charges.

2095

They say, "No. You are in partnership with us. We have all of these theatres and we have lumped them all together and we have all this overhead and all this general office expense and all this, that and the other thing; we may have been losing money on a lot of pictures, but we have a right to level the whole thing out against our entire year's product." We say, "You haven't any such thing."

2096

The Special Master: What items do you say they have a right to charge? You give the direct items of operation at the theatre, and so forth, during the week. What is your view on insurance premiums?

Mr. Driscoll: I say as to the theatres they have no right to charge those. That is my view. It is very clear in our brief. Here in Exhibit L-8, the items they are entitled to charge, the pay-roll and the trade bills, those are the items they are entitled to charge against it. Further down on the same page you have the cost of "Letty Lynton", the cost of the other attractions; they are entitled to charge those.

The Special Master: What he is saying is that he is entitled to charge the ordinary overhead charges of that theatre?

2097

Mr. Driscoll: You mean this witness?

The Special Master: No; that is what Mr. Pollak says. You disagree with him on that. You claim all those items are improper charges?

Mr. Driscoll: That is right.

The Special Master: Then you go further and say that they did not exist anyway and that they are inaccurately stated.

Colloquy of Counsel.

2098

Mr. Driscoll: I do not say they are inaccurately stated. I have not taken that position as to any of their items.

The Special Master: Why do we go along and pursue this line?

Mr. Driscoll: I don't know. I have never taken that position.

The Special Master: He does not object to this classification of the items as a charge. Why do you have to go further into it?

Mr. Pollak: I did not know until this moment that he agreed to the reasonableness of the charges.

2099

Mr. Driscoll: He does not at this moment. Let us not have a misunderstanding about that.

The Special Master: But they do stand unaffected by any cross examination, whether he agrees to the reasonableness or not; primarily, if they are proper charges in this case. He has not impaired their validity, has he?

Mr. Pollak: I do not think so, Mr. Auchincloss. But I think the point is now covered, the proposition being reduced to an issue of law as to which we are quite confident from the authorities we have submitted.

2100

The Special Master: If he goes ahead and says that that is an improper, ridiculous and unreasonable charge, then you will have any opportunity to go further into it.

Mr. Pollak: Certain ambiguity has arisen by reason of two meanings of the word "reasonable". I understand that, apart from a general proposition of law here. Mr. Driscoll has now clearly stated that we are entitled to deduct nothing in the way of overhead. There is certainly no dispute that these expenses were incurred. He denies that they were reasonable.

Charles Moskowitz—For Defendants—Direct.

The Special Master: He says they are entirely improper charges. He has not in his cross examination or brief charged that such charges were inaccurate. 2101

Mr. Pollak: No, I understand that he does not charge that they were excessive. He contends that they should not be allowed at all. I think with that explanation of the issues we can dispense with examination along this line, unless cross examination elicits something different, or direct examination—

The Special Master: We will go ahead then.

Mr. Pollak: I think I have only one more thing to ask you. I won't say this is in connection with the specific point of law. 2102

By Mr. Pollak:

Q. Mr. Moskowitz, you can answer this question just yes or no. Have you formed an opinion as to the length of time and the approximate cost that would be involved in getting an appraisal now as of 1932 of the 100 theatres in which "Letty Lynton" was shown? Just, have you formed such an opinion? A. Yes.

Q. Will you state what that opinion is?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

Mr. Pollak: The point of it is this, Mr. Special Master. We are computing these overhead items, as you will see from the exhibits, on a basis of investment and depreciation. The decisions are that where overhead is allowed it may be computed in one of several practicable ways, depending on the exigencies of the business. There is a situation where it may be computed on an appraisal. There is a situation in which it may be computed on investment and depreciation. I wanted to bring out 2103

Colloquy of Counsel.

2104

for the record the impracticability in this particular situation of getting an appraisal now as of 1932 for 100 scattered enterprises. I am entitled to do it in my judgment. I just want to foreclose any argument that if we are entitled to overhead it should have been computed on a somewhat different basis.

Mr. Driscoll: You mean, if it was one theatre it would be all right, but because you have to multiply it by 100 it is not?

Mr. Pollak: I think that is one of the circumstances.

2105

The Special Master: You just suspend that question until you find out what Mr. Driscoll asks. My inclination is that unless Mr. Driscoll goes into this particular item we are just wasting time. You won't be prejudiced by it.

Mr. Pollak: I am not thinking only of you, Mr. Auchincloss. I am thinking also of some higher court. I think Mr. Driscoll ought to let us know what his objections are in this record. All I want to know from Mr. Driscoll is whether or not his objection is based upon the proposition that computation should have been predicated upon an appraisal; that is all I want to know. If he tells me that is not the nature of his objection, I don't care to have the question answered.

2106

Mr. Driscoll: There is no statement that I am going to make other than to refer Mr. Pollak to our brief. Mr. Pollak has had the benefit of our brief for some period of time. He knows exactly what our position is and he is not going to get any statement of that sort on the record at this time. The brief is perfectly clear on the point; nobody can mistake it.

The Special Master: At what page of the brief is this particular point?

Charles Moskowitz for Defendants—Direct.

(Discussion off the record.)

2107

Mr. Pollak: Whatever his position in the brief may be, I want the record to show the fact in Court that this issue is either taken care of by evidence or waived by Mr. Driscoll.

Mr. Driscoll: Mr. Driscoll is not waiving anything.

Mr. Pollak: I certainly want the record to show this whole issue.

(Discussion off the record.)

The Special Master: He has questioned it. You can go ahead and put it in.

Mr. Pollak: Will you read the question?

2108

(The pending question was read by the stenographer.)

Mr. Driscoll: I object to that.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

A. In my opinion, to properly appraise any one of these properties would take at least sixty days. It would be necessary for the appraiser to not only measure the different component parts of the building such as bricks, cement, and so forth, establish costs, cube up various parts of the building, satisfy himself as to values as of 1932, get the physical condition as nearly as possible of 1932, allow for reasonable depreciation from then until now. Again I say it would take at least two months to arrive at a value of any of these properties. You have 102 pieces of property besides the studio. The length of time would depend on how many competent appraisers, with knowledge of theatre property, you could find. The cost would be exorbitant.

2109

Q. Give a figure for the cost, minimum.

Mr. Driscoll: I object to that.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

Jesse T. Mills—for Defendants—Recalled—Direct.

2110 A. Possibly half a million dollars.

Q. Mr. Moskowitz, just one more question. You can answer yes or no. Are you familiar with the rates of depreciation on theatre equipment and on buildings used for theatre purposes? A. Yes.

Q. What would you regard as reasonable rates for those two? A. Ten per cent. on equipment; three per cent. on buildings.

Q. Were those rates customarily listed by you in 1932 and preceding years on reports to the government? A. Yes, they were.

Q. And passed by the government?

2111

Mr. Driscoll: I object to "passed by the government". It is not the best evidence and would not affect the issue here anyway.

The Special Master: It is not the best evidence, but I will take it.

Mr. Driscoll: Exception.

A. Yes.

Mr. Pollak: You may cross-examine.

Mr. Driscoll: No cross-examination.

The Special Master: Any other witnesses, Mr. Pollak?

2112

Mr. Pollak: I want to recall Mr. Mills for a few questions.

JESSE T. MILLS, recalled.

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, referring to the item of one million 539 odd thousand dollars appearing on Exhibit 18-D-5, have

Jesse T. Mills—for Defendants—Recalled—Direct.

you the checks for those payments? A. I have (producing checks). 2113

Mr. Pollak: Do you wish them introduced in evidence, Mr. Driscoll?

Mr. Driscoll: I have no wishes in the matter. It is entirely up to you to prove the case.

Mr. Pollak: It is a question whether the record should be cluttered with a mass of checks. Will you look at them (handing papers to Mr. Driscoll)?

Mr. Driscoll: I think the record ought to show that the defendants have produced the following checks: Check for \$50,000 payable to the order of Loew's Incorporated, dated 9-30-31, with the notation "repayment of loan". 2114

Check for \$59,992.42—

Mr. Pollak: They are all listed on Exhibit 10, Arthur.

Mr. Driscoll: That doesn't show the notations on the checks. I think we can shorten it up considerably in this way. You say that the list of checks did appear on Exhibit 10.

—dated 9-26-31, to the order of Loew's Incorporated. The notation is "Interest—period ending 9-26-31"; \$109,992.42, less payment on account \$50,000". 2115

Check, \$107,907.93, to the order of Loew's dated 10-24-31, and notation on the voucher is, "Interest—period ending 10-24-31".

The next is a check for \$44,446.93, to the order of Loew's, dated 11-5-31; notation on the voucher, "Additional interest to 9-26-31, \$21,370 Additional interest to 10-24-31, \$23,076.93".

The next is check for \$130,265.65, to the order of Loew's, dated 11-21-31; notation on voucher is "Interest—period ending 11-21-31".

Jesse T. Mills—for Defendants—Recalled—Direct.

16

The next is check for \$130,497.42, to the order of Loew's Incorporated, dated 12-19-31; notation is, "Period ending 12-19-31".

The next is check for \$129,809.47, to the order of Loew's Incorporated, dated 1-14-32; notation on voucher, "Interest for period ending 1-15-32".

Next is check for \$126,701.52, to the order of Loew's Incorporated, dated 2-13-32; notation on voucher is, "Interest—period ending 2-13-32".

The next is check for \$122,728.73, to the order of Loew's Incorporated, dated 3-14-32; notation on voucher, "Interest—period ending 3-12-32."

17

Next check, for \$114,689.96, to the order of Loew's Incorporated, dated 4-7-32; notation on voucher, "Interest—period ending 4-9-32."

Next check, \$110,411.13, to the order of Loew's Incorporated, dated 5-7-32; notation on voucher, "Interest—period ending 5-7-32".

Next check for \$106,884.28, to the order of Loew's Incorporated, dated 6-4-32; notation on voucher, "Interest—period ending 6-4-32".

Next check in the amount of \$103,832.51, to the order of Loew's Incorporated, dated 7-1-32; notation on voucher, "Interest—period ending 7-2-32".

118

Next check for \$101,974.96, to the order of Loew's Incorporated, dated 7-30-32; notation on voucher, "Interest—period ending 7-30-32".

Next and last check for \$119,344.88, to the order of Loew's Incorporated, dated 9-1-32; notation on voucher, "Interest for period ending 9-1-32".

By Mr. Pollak:

Q. Mr. Mills, in connection with distribution in foreign countries, the various corporations controlled by Culver made distribution in the foreign lands, the testimony has

Jesse T. Mills—for Defendants—Recalled—Direct.

shown, of "Letty Lynton" and of many other pictures. Some of those pictures were unprofitable. Is it a fact, based on your experience as an accountant and your acquaintance with this and other industries, that the costs of distribution per unit distributed are affected by the number that are distributed? Just, are they affected? A. They are.

2119

Q. Which way; increased or diminished? A. Naturally the larger the number of units distributed, the lesser the cost per unit distributed.

Q. Also based on your experience with the motion picture industry, is there, if you know—just, yes or no—a requirement by certain foreign countries that there must be distributed a certain proportion of pictures produced in those countries?

2120

Mr. Driscoll: That is too general. Let us find out what the situation was in 1932 and the foreign countries in which that condition existed.

Mr. Pollak: I withdraw that question.

Q. By the way, the answer you have given applies to the year 1932? A. Always.

Q. Mr. Mills, in 1932 and 1933, if you know, did any foreign countries require the distribution of a certain quota of pictures produced in those countries, along with American films? A. They did.

2121

Q. Can you name any such countries? A. Notably England, Germany, France and, I think, Italy.

Q. Mr. Mills, also based on your knowledge, were those foreign produced films generally successful or not?

Mr. Driscoll: I object to that as to general; calling for a conclusion.

Q. Speaking comparatively, were they more or less successful than American pictures?

MICRO CARD

TRADE

MARK



22

39



1414

65



Jesse T. Mills—for Defendants—Recalled—Direct:

2122

Mr. Driscoll: Objected to as galling for a conclusion.

The Special Master: Objection sustained.

Q. Do you know whether some of them had a loss? A. They did.

Q. Do you know whether more of them had losses than the American pictures?

Mr. Driscoll: Objected to. It is an attempt to do indirectly what the Special Master has ruled he may not do directly.

2123

The Special Master: I think Mr. Driscoll is right. If you want to go into it you will have to do into it in more detail.

Mr. Pollak: It is based on a question put by Mr. Driscoll.

Mr. Driscoll: Will you kindly point out the question, Mr. Pollak?

(Discussion off the record.)

Mr. Pollak: I beg pardon; it was a statement by Mr. Raftery (indicating page of record).

2124

Q. Have you figures that would show the losses of the foreign companies subsidiary to Culver upon foreign produced films?

Mr. Driscoll: I object to the form of that question.

Mr. Pollak: I am not even sure that they have the figures.

(Discussion off the record.)

Q. Referring, Mr. Mills, to Exhibit 21-B-1, 2 and 3, have you an explanation to make concerning the item, profit on outside producers' pictures? A. Yes; that in these schedules

Jesse T. Mills—for Defendants—Recalled—Direct.

in general you will notice that where the figures are the contra to the description in the description column, it is shown in red. On the originals of those sheets that item is red, indicating that there was a loss in England under that caption as against a profit which would have been indicated if there had been black ink. That description, "on outside producers' pictures", should perhaps be elaborated on to further describe them as foreign pictures, English pictures.

2125

By the Special Master:

Q. Is it your contention that that \$27,000 is the result of pictures that you had to produce? A. That we had to release in order to release the American pictures. We had to release a number of English pictures in order to release American pictures.

2126

By Mr. Pollak:

Q. Does the same apply under the same caption to other countries? A. It does.

Q. In instances where there were losses? A. Yes and in instances where there were profits they were shown.

Q. And the phrase "outside producers" does not mean rival American producers? A. It does not limit it to that.

2127

Q. Did these subsidiary companies of Culver ever distribute pictures of other American producers? A. In only a very few instances a year, and my recollection tells me that there were none in Europe; principally in South Africa or Australia where any distribution did occur.

Q. In European countries this item refers to a profit or loss upon quota pictures, is that right? A. Yes.

Mr. Driscoll: Why not let the witness's testimony stand as he gave it. I don't think it is fair to sum-

Jesse T. Mills—for Defendants—Recalled—Direct.

2128

summarize it that way when it is not in accordance with the testimony.

Q. Did these subsidiaries of Culver distribute any American pictures other than those as to which there were certain special arrangements—than the Cosmopolitan pictures?

A. They did.

Q. In what country? A. I don't know the exact countries; there were a few such.

Q. That was in 1933? A. It was.

Mr. Pollak: Do you want those instances?

Mr. Driscoll: Do I?

2129

Mr. Pollak: Yes.

Mr. Driscoll: It seems to me that you have gotten into a mess and will have to revamp this entire record.

(Discussion off the record.)

Mr. Pollak: If you think that you want these rare instances checked up, we will check them up.

Q. Can you find out, in 1933 what pictures not of M-G-M progeny were produced in foreign lands? A. Distributed?

Q. Distributed. A. I can find that out.

Q. And the amounts? A. Yes.

2130

Q. Can you do that by Tuesday? A. Yes.

Q. As far as you know, were there any instances in which there were losses on any pictures, other than your own pictures, in 1933? A. I will have to answer that on Tuesday.

Q. Mr. Mills, have you with you a group of checks aggregating some \$922,000? A. I have. (Checks produced by the witness.)

The Special Master: What exhibit is that?

Mr. Cohen: JS-D-5.

Jesse T. Mills—for Defendants—Recalled—Direct.

Mr. Driscoll: \$922,141.09.

2131

Mr. Pollak: Mr. Rubin will testify concerning the item. I think it will save time to have Mr. Mills testify to these checks.

The Special Master: Are they listed anywhere?

Mr. Pollak: It is aggregated on Exhibit 18-D-5.

Q. Suppose you read the items off to us? A. This is a list of checks aggregating \$1,034,416.80, which, less an adjustment of \$112,275.71 made in January 1933, brings the net amount down to \$922,141.09, the amount accruing to Louis B. Mayer Pictures as percentage compensation for the year ending August 31, 1932. These checks are all checks of Metro-Goldwyn Pictures Corporation and payable to the order of Louis B. Mayer Pictures (reading):

2132

Check No.	Date	Amount
1884	9-26-1931	\$ 38,461.54
2773	10-24-1931	38,461.54
3702	11-21-1931	38,461.54
3607	11-20-1931	5,570.63
4306	12-11-1931	2,000.00
4094	12-4-1931	13,043.79
4330	12-15-1931	38,320.59
4523	12-19-1931	38,461.54
4872	12-30-1931	50,000.00
4989	12-30-1931	89,000.00
5364	1-15-1932	38,461.54
5874	2-4-1932	6,416.24
6167	2-11-1932	38,461.54
6928	3-10-1932	38,461.54
7566	4-7-1932	38,461.54
7991	4-20-1932	216,000.00
7565	4-7-1932	12,000.00
9922	6-17-1932	69,084.90

2133

Jesse T. Mills—for Defendants—Recalled—Direct.

2134

Check No.	Date	Amount
10040	6-21-1932	67,147.52
10574	7-1-1932	38,461.54
11538	7-29-1932	38,461.54
11254	7-22-1932	34,916.95
12226	8-22-1932	7,839.26

Blank number—this is the number where they pulled the check a year later—blank number and blank date, \$38,461.54. Those add up now to the amount of \$1,034,416.80, that is, a total amount of more than \$922,000. There was an overpayment, which was adjusted in the January payment, and we finally arrive at the audited figures for the year.

2135

Mr. Driscoll: I would like to have the record show that the check of September 26, 1931, bears the notation on the voucher, "Guaranty".

Check of October 24, 1931, "Guaranty for period ending 10-24-31."

Check of November 21, 1931, "Guaranty for period ending 11-21-31."

Check of November 20, 1931, "Additional compensation, period ending 9-25-31."

2136

Check of December 4, 1931, "On account."

Check of December 15, 1931, "Additional compensation to 11-20-31."

Check of December 19, 1931, "Guaranty for period ending 12-19-31."

Check of December 30, 1931, "Advance re additional compensation."

Check of December 30, 1931, "advance re additional compensation."

Check of January 15, 1932, "Guaranty for period ending 1-16-32."

Jesse T. Mills—for Defendants—Recalled—Direct.

Check of February 4, 1932, "Additional compensation." 2137

Check of February 11, 1932, "Guaranty, period ending 2-13-32."

Check of March 10, 1932, "Guaranty."

Check of April 7, 1932, "Guaranty."

Another check of April 7, 1932, "On account of additional compensation to 3-12-32."

Check of April 20, 1932, "On account of percentage retained, to 3-11-32."

Check of June 17, 1932, "As per agreement."

Check of June 21, 1932, "As per agreement."

Check of July 1, 1932, "Guaranty."

2138

Check of July 29, 1932, "Guaranty."

Check of July 22, 1932, "Additional compensation."

Check of August 22, 1932, "Additional for period ending 7-29-32."

By Mr. Driscoll:

Q. This one was the next year's? A. Yes, that was the one where they pulled the wrong check.

By Mr. Pollak:

Q. The checks, if you know, were all paid pursuant to an agreement then in effect with Louis B. Mayer Pictures which has not yet been produced in evidence? A. That is true. 2139

Mr. Pollak: Have you any cross examination of Mr. Mills?

Mr. Driscoll: No.

The Special Master: Have you anything more today?

Colloquy of Counsel

2140 Mr. Pollak: I think that is all. There are these matters of Mr. Craig.

Mr. Driscoll: As to foreign versions.

Mr. Pollak: Under date of September 10, 1937, Mr. Craig writes to Mr. Cohen at 1740 Broadway, as follows: "On pages 238 and 240 of my testimony I testified that on the shot foreign versions there was an overhead charge of \$1,200 per version and on synchronized versions \$500 per version. Actually the studio method in 1932 was to charge \$1,500 overhead on Synchronized versions and \$500 on superimposed versions.

2141 "All of the 'Letty Lynton' versions were synchronized, on which \$1,500 per version was properly charged. The German version, French version and Italian version, each synchronized and \$1,500 was charged for each version. There was no superimposed version of 'Letty Lynton'. There were no shot versions in the fiscal year of 1932." Signed by Mr. Craig.

Now, Mr. Driscoll has stipulated that Mr. Craig, if called, would testify as shown in a series of sheets, which I think we should have copied and given to Mr. Driscoll, but mark them as exhibits. He has already seen them. You can mark the original as one exhibit.

2142 The Special Master: That is all Craig?

Mr. Pollak: Yes.

The Special Master: Put it in as part of the Culver City testimony; put it in as the next exhibit in the "C" series. It refers to his previous testimony. What does it do? Correct other things?

Mr. Pollak: It meets their contention concerning the apportionment of overhead on a ratio of .018. It only became germane lately, after their brief was in.

The Special Master: All right; put it in.

Exhibits Offered in Evidence.

(The paper just offered was received in evidence 2143
and marked Defendants' Exhibit No. C-30, of this
date.)

Mr. Pollak: I think it will help you with this
exhibit, which is not important, if I read, with Mr.
Driscoll's consent, the following summarization of
it, contained in a letter which has been shown to
Mr. Driscoll, also from Mr. Craig to Mr. Cohen.

Mr. Driscoll: Let me see it before you read it.
(Paper handed to Mr. Driscoll.)

Mr. Pollak: Have you any objection to putting
the whole letter in?

Mr. Driscoll: No; go ahead and put it in. 2144

Mr. Pollak: I will offer it as the next Culver
exhibit.

(The paper just offered was received in evidence
and marked Defendants' Exhibit No. C-31, of this
date.)

Mr. Cohen: May I withdraw the exhibits long
enough to make copies of them, and I will furnish
a copy to Mr. Driscoll?

The Special Master: Yes.

Mr. Pollak: I offer in evidence the certificate of
incorporation and by-laws of Motion Picture Pro- 2145
ducers and Distributors of America, Incorporated.

(The papers just offered were received in evidence
and marked Defendants' Exhibit No. 31, of this
date.)

Mr. Pollak: I offer in evidence the form of
Motion Picture Distributors application for Class
A membership, including resolution with reference

Exhibits Offered in Evidence.

to fees and dues adopted by the incorporators of the association.

(The papers just offered were received in evidence and marked Defendants' Exhibit No. 32, of this date.)

Mr. Driscoll: Of course, if a member should by mistake wrongly compute their gross for a year I don't suppose that even Walter Pollak would contend that they could not correct that and get back that overpayment. This is the interesting part of that exhibit and all that need to have gone into the record. I will dictate it into the record. I don't suppose you will furnish me with a copy of it.

Mr. Pollak: Yes, we will.

Mr. Driscoll (reading): Until the amount of such gross revenue shall finally be determined by agreement between the member and the Association . . . the amount of the gross revenue fixed tentatively by the Board shall be used as the basis for computing the amount of the membership fee and or dues of the member, and the member shall make payments to the Association on that basis. If the amount of such gross revenue shall finally be determined by such agreement . . . the Association and the member shall make such adjustment as may be necessary with respect to payments previously made."

Mr. Pollak: I have one more document, which was compiled by Mr. Craig. It is a schedule showing the charge of unassigned time as to stars for all feature pictures containing stars during the production year of 1932. It is to show that the amount of unassigned time in the case of this picture and these stars was actually considerably less than

J. Robert Rubin—for Defendants—Direct.

the average, as I understand the schedule. I think 2149
this should be a Culver City item.

Mr. Driscoll: I object to that as incompetent, irrelevant and immaterial.

The Special Master: It is a question of law. Objection overruled.

Mr. Driscoll: Exception.

(The paper just offered was received in evidence and marked Defendants' Exhibit C-32, of this date.)

(Hearing adjourned to October 5, 1937, at two o'clock P. M.)

2150

HEARING OF OCTOBER 5, 1937

J. ROBERT RUBIN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Will you give your name and residence? A. J. Robert Rubin, 993 Fifth Avenue, New York City.

Q. What is your occupation? A. Lawyer; vice-president and general counsel for Metro-Goldwyn-Mayer Corporation 2151
and vice-president of Loew's Incorporated.

Q. Mr. Rubin, would you tell in general terms your experience in connection with the motion picture industry?

A. In general terms, I have been connected with the motion picture industry since 1915. In 1915 I caused to be organized the Metro Pictures Corporation, as a lawyer. I did some work for it after that and I think I was assistant secretary.

I worked with the Metro Pictures Corporation and I was assistant secretary until 1920 when the control, or

J. Robert Rubin for Defendants—Direct.

2152

rather all the capital stock, of Metro Pictures Corporation was sold to Loew's Incorporated.

Thereafter I continued with Loew's Incorporated in control of the Metro Pictures Corporation.

In 1924 there was a merger between the Metro Pictures Corporation and the Goldwyn Pictures Corporation under the title of Metro-Goldwyn Pictures Corporation. At the same time the Metro Pictures Corporation purchased all of the assets of Louis B. Mayer Pictures which had been assigned by the Louis B. Mayer Productions.

2153

I continued to remain with the Metro-Goldwyn Pictures Corporation, being vice-president, and continued as secretary and became a director of Loew's. I have been occupying the position of vice-president and general counsel of Metro-Goldwyn Pictures Corporation practically since the Metro organization. At the early stages we did not call my title general counsel, but that is what it developed into and what I did.

2154

In 1917 I was with Mr. Mayer. He and I organized the Anita Stewart Pictures. We engaged Miss Stewart as our full star in that company. Mr. Driscoll's office was representing Miss Stewart at that time. Mr. Mayer and I were the majority control of the Anita Stewart company. He was majority; I had a minority interest, and there were others interested in it. We manufactured Anita Stewart pictures and released them through the First National Pictures Corporation.

Then we organized the Chaplin Mayer Corporation which manufactured pictures with Mildred Harris Chaplin as the star.

Then we organized the Louis B. Mayer Productions and we produced pictures with John Stahl as director, Fred Niblo as director, Reginald Barker as director.

We released the Stahl pictures through the First National Pictures Corporation and released the Reginald Barker and Fred Niblo pictures through Metro Pictures Corporation.

J. Robert Rubin—for Defendants—Direct:

Along about 1924, when the Metro was starting to take over the Goldwyn Pictures Corporation, I talked with Mr. Schenck, discussing the production management of the Metro Pictures Corporation and particularly if Metro would take over the Goldwyn Pictures Corporation and how production activities were to be managed. He wanted to know whether the Mayer group would come and take over the production management.

2155

I talked to Mr. Mayer and then we arranged between Mr. Mayer, Mr. Thalberg—I should say Mr. Thalberg in 1923 joined Mr. Mayer and myself in the Louis B. Mayer Productions. In 1924 Mr. Mayer, Mr. Thalberg and myself had a meeting with Mr. Loew and Mr. Schenck and Mr. Bernstein and Mr. Leo Friedman who represented the Loew group and the Metro Pictures Corporation and we arranged the contract of April 7, 1924, when Mr. Mayer, Mr. Thalberg and I under the name of Louis B. Mayer Pictures took over the production management of all the Metro-Goldwyn Pictures. That contract I think was for three years with an option for three more.

2156

Q. I think the most convenient way, Mr. Rubin,—if I may interrupt—and which will be a help to your Honor showing the whole contractual relation up to the end of the fiscal year of 1932, at one time—they happen to be printed. There is also printed with them a document, December 15, 1932, which has no relevancy to this case, being after the conclusion of that fiscal year, but I offer the whole of this group of documents marked "Metro Pictures Corporation and Louis B. Mayer Pictures Incorporated, agreement dated April 7, 1924, together with modifications," through and including page 51. This seems to bear some exhibit number of a printed character which has no particular significance.

2157

(The document just offered was received in evidence and marked Defendants' Exhibit 33 of this date.)

J. Robert Rubin—for Defendants—Direct.

2158

The Special Master: Is this a contract in support of the item of \$922,000?

Mr. Pollak: Yes. You will recall that the fact of those payments was shown at the last hearing.

Mr. Driscoll: In order not to hold up this hearing, I would like to reserve my right to object to it after I have had an opportunity to examine it. I can't examine 52 printed pages in time to put an objection on the record that will meet the situation.

Mr. Pollak: That is agreeable to me.

2159

A. The first contract was entered into between us; that was for three years and I think there was an option for three years more. That option was exercised and the contract was, I think, during those six years modified in some degree.

In 1927 a new contract was entered into, or rather, a continuation of the old contract was entered into, in which Loew's was added as a party and they agreed to take over and assume the obligations of Metro Pictures Corporation until 1932. The contract by its terms extends the original contract to 1932.

At the end of 1932, or April 7, 1932, the contract would revert back to Metro Pictures Corporation as the sole party obligated under the agreement.

2160

By Mr. Driscoll:

Q. Is that contract of 1927 with Loew's Incorporated in this binder? A. Yes. As a matter of fact, all the contracts between Loew's and Metro-Goldwyn and the group consisting of Mayer, Thalberg and myself, are in that folder.

Q. Go ahead, Mr. Rubin. A. I think it was in November, 1927, that the contract between Metro, Loew's, Louis B. Mayer Pictures, was transferred to Louis B. Mayer Pictures, a copartnership of Mayer, Thalberg and myself. We con-

J. Robert Rubin—for Defendants—Direct.

tinued as a copartnership rather than a corporation from November, 1932, until Thalberg's death; and Mayer and I are still continuing under that contract, which expires December 31, 1938. 2161

Q. As it now stands? A. Yes.

Q. Reverting to the conditions as they were in 1932, the contract was then to run to what period? A. In 1932 it was to run to April 7, 1937.

Q. A five-year extension had been arranged? A. A five year extension had been arranged in May, 1930.

Q. Go ahead, Mr. Rubin, and tell the story in your own way. A. We all had different duties. Mr. Mayer was vice-president in charge of production; Mr. Thalberg had general supervision of all production, and I had general charge of all production activities east of the Rockies. That would include everything that happened in the City of New York, everything that happened throughout Europe. 2162

I had under myself a department which read and advised as to outstanding plays. I had a department under myself which read and synopsised magazines, books, stories of all kinds, and scenarios. We had a talent department which investigated the talent throughout the Western Hemisphere and throughout Europe.

Q. By "talent", what do you mean? A. I mean director, actor, writer. Every director, actor and writer who entered into a contract with the studio away from the studio entered into his contract with me. If it was in Europe, then the contract would come to me; if it was in New York or Chicago or any place in this section of the country I would do the negotiating. 2163

Q. And if the contract were entered into on the Coast it would be entered into by them? A. Every actor, director or other person who contracted west of the Rockies contracted through the Coast, but in the East I assumed that responsibility for the Coast.

Q. We had, during those years, in addition to that, the

2164

public relations department. The public relations department was a department that contacted all city, state and Federal authorities in the East. If we were making a picture in New York or any place in the East, our production department here would contact with the city authorities or state authorities or federal authorities. If we might need to make arrangements to take any picture on Federal grounds, that was part of our obligation. Any arrangement with the United States Government for the use of the parks, or in connection with the Navy or Army, that was part of our obligations. We did all that contacting.

2165

(At this point Mr. Pollak withdrew from the Court, with permission of the Special Master.)

A: (Continued.) We had charge also of censorship problems in the East. Our story department read and synopsized and sent recommendations during the year 1932 of approximately 5,000 stories and plays. We saw probably 20,000 people who asked for interviews. We had 4,000 auditions and we made tests of 300 people. That was an eastern studio production problem. And we have continued. That was begun in 1924 and that has continued until now.

2166

In addition to that we had contact with all of the branch offices throughout the United States who sent us recommendations in regard to talent. When a man in any one of the big cities where we had an office saw an act which he thought was of interest, the information was conveyed to my office. That was investigated. We had a number of talent scouts who worked under me who went and investigated that talent suggestion. If it was worthy we called them in, had auditions and possibly a test.

I don't know whether you are familiar enough with the test. If you are I won't have to describe it.

The Special Master: I am.

J. Robert Rubin for Defendants Direct.

Mr. Driscoll: He had a thorough course at the Coast. 2167

By Mr. Cohen:

Q. I think, for the purposes of the record, you should describe what a test is. A. A test is a photographic and sound record of some literary material that an actor portrays. We want to know what kind of an actor he is, so we give him the lines to learn and then we take a photograph of him and a sound recording, a photograph of his actions and a sound recording of his voice. We can then tell how he will appear in a play, in a picture. Nobody—I don't know of any single exception—is engaged without a test or without previous motion picture experience. It is a curious thing. It is almost impossible to tell—I withdraw that; it is very difficult to tell how a person will photograph until you get him in front of a camera. You know certain features will photograph better than others. So you pick out certain persons, those you know will photograph well. It is a fact that out of 20,000 people that we see, 4,000 auditions are given and we make tests of 300 in a year. 2168

I don't know of anything else I can tell you.

Q. After these tests were made in New York were they sent to the West Coast? A. Yes, all tests were sent to the West Coast and viewed by the studio and there the decision is made as to whether they should engage them. 2169

I should add that when the tests are made these people are under option to us. We make a proposed contract, which is determined by the Coast's assent or dissent. If they accept them then the contract goes into force; if they don't, the contract falls. It is an option for a limited period, the period being practically limited to the time it takes to make the test, send it to California and have it reviewed. Then a report would come back to me from the studio as to whether or not they want those particular people.

J. Robert Rubin for Defendants—Direct.

2170

I may say that in 1925 25 people were engaged from the 300 that were tested.

Q. Under your charge is there also a scenario department on the East? A. When you say scenario department, I say reading department, a play, book and magazine reading department. I think I stated before, Mr. Cohen, that these two reading departments reviewed, synopsisized and made recommendations covering five thousand plays, books and magazine stories. I may say also that I personally went to every play that was produced, and I have been doing that since 1924. I make a report the day after I see a play. I go almost invariably to the opening, and if I am very much interested in the play I go twice or three times. But I go to all of them, and have been doing that since 1924.

2171

We also have as one of the functions of our talent department the reviews of all night clubs, all entertainments of any kind. We cover colleges where they give plays, all dramatic schools, all little theatres, all summer stock companies, and all broadcasting stations. We have somebody who reviews each one of those broadcasting acts. A report is made to me and then compiled and then sent to the Coast.

Every form of amusement is covered by us throughout the world. We have scouts, a talent scout in London; we have a reading department in London. We have a talent department in Paris and a reading department in Paris. We have a talent department in Budapest and a reading department in Budapest. We have one in Vienna, and we get advices from our offices in Rome, Poland and Scandinavia.

2172

All these reports are collated in my office and then sent on to California with recommendations.

Q. Can you state, Mr. Rubin, whether you are in contact with the West Coast on these production matters, and if so how often you are in contact with them? A. I have been in contact with them every day and in many days more than once, since 1924. At the time Mr. Thalberg was

J. Robert Rubin—for Defendants—Direct.

actively in charge of production. I would be on the telephone with him as much as four or five times a day, beginning in the afternoon and ending around one-thirty in the morning. He was always wanting to know what was happening, the prevailing stories, books and plays, and we would have discussions about them. Likewise as to talent. We still do. I go there twice a year.

2173

In the spring we have meetings in regard to our program for the coming year, our program starting in, our selling season starting in the last of May, first of June, so we get up our program the first of April. That is not so important any more, for the last two years; that was so in 1932. Then we sold by star series; now we sell so many pictures. We did not sell that way then.

2174

Q. Other than the change in sales policy, would you say that the conditions that you have just described were in existence in 1932? A. Yes, with the exception of the method of selling they were exactly the same.

I might add this, that we spend here in the purchase of plays and books approximately a million dollars a year. We purchase literary material here of approximately one million dollars a year, and have been doing it since 1926. Most literary material is purchased here because it involves not only the purchase of literary material sold here in New York but it involves literary material sold throughout Europe which is purchased through me.

2175

I may say also that while engaged in these production activities I remain as general counsel in supervision of the affairs of the company.

If we want money for the purchase of a play or for the hiring of talent, we put in a voucher and receive a check from the accounting department.

(Mr. Pollak returned to the hearing room.)

J. Robert Rubin—for Defendants—Direct

2176 By Mr. Pollak:

Q. And all the testimony you have given relates in essentials to conditions as they existed in 1932? A. Yes.

Q. I want to ask you one or two other questions. Your association with both Mr. Mayer and Mr. Thalberg antedated 1924? A. Oh, yes.

Q. And with Mr. Mayer long before that? A. Mr. Mayer I knew in 1914, we having become partners in 1917; Mr. Thalberg becoming a partner in 1923.

Q. Mr. Rubin, have you described the legal department?

A. No.

2177 Q. Will you describe that in general terms as it was in 1932? A. We had in charge of the legal department myself as general counsel. I had four assistants, and we took care of all the legal problems of production east of the Rockies. Loeb, Walker & Loeb represented us in California. We had a Mr. Sidney Wright representing us in London, and we had a Monta—still have both of these gentlemen—representing us in Paris. We have consulting counsel in Vienna. These gentlemen are under retainer to us.

2178 We had at the time all of the problems of distribution throughout the world; all litigation involving production and distribution came to our legal department here. We conducted a general law office covering every phase of company activity along those lines. We did not touch Loew's Incorporated because they had a legal department of their own. Mr. Friedman headed the legal department of Loew's Incorporated. All the problems affecting Loew's Incorporated were handled by his office.

Q. Mr. Rubin, did the legal department have anything to do with either the picture Letty Hynton or the play Dishonored Lady, excepting the preparation of the conditional contract for the purchase of the motion picture rights of Dishonored Lady and the preparation and supervision of a contract for the purchase of the motion picture rights of

J. Robert Rubin—for Defendants—Direct.

Letty Lynton? A. No; but I may add, Mr. Pollak, that the contract for the purchase of the motion picture rights of Letty Lynton was done in London by our London correspondents.

2179

Q. That appears from an exhibit in evidence? A. Mr. Wright represented us in that. My office here represented the company in the preparation of the conditional contract for the purchase of Dishonored Lady.

Q. The organization which you have described as existing in 1932, was that built up essentially between the dates 1924 and 1932? A. It was. It began building immediately after the merger of Metro and Goldwyn, and continued.

Q. Mr. Rubin, you have said something about public relations. Would you care to expand and explain the nature of the public relations, at least in general terms? A. I think I did, Mr. Pollak.

2180

Q. Have you discussed censorship? A. I think I said that one of the functions of our department was to meet censorship objections; in case a picture was objected to by the censors we would have to go and see if we couldn't get them to withdraw or to explain to them what was meant, or change the title. In the old silent days it was just a question of change of title or of cutting it. That was part of the work of our department.

Q. You have testified that in those public relations you dealt with public authorities. Have you explained that it involved the negotiations as to the use of public places and public buildings? A. I think I did that.

2181

Q. Did you have anything to do, in 1932, with the preparation of the production schedule of M-G-M? A. Yes, Mr. Mayer and Mr. Thalberg and I each spring at that time would meet in California and discuss and arrange our production schedule for the year. I would go out with the stories that we fellows in our eastern office would recommend, and between the three of us we would work out a schedule.

J. Robert Rubin—for Defendants—Direct.

2182

Q. The decision as to what was to be produced was a decision reached by the three of you? A. That is right.

Q. Your visits to the Coast were roughly how often?

A. Twice a year, spring and fall.

Q. The series of documents in evidence as Exhibit 33, put in by me this afternoon, make reference to a minimum guaranty. I will ask you to tell us, in general terms, whether M-G Pictures Corporation or Loew's lost any money by reason of that guaranty?

Mr. Driscoll: I object to that.

2183

A. No, they did not.

Q. I will rephrase it. Did in any case your share of the profits fall short of the guaranteed minimum? A. No, it did not. They did in one year, but it was made up in the next year. The guaranty was over a two-year period. Never did they fail to recoup their advances to us.

Q. Mr. Rubin, would you tell us in general terms, and stating a maximum, what the total of the stock interest in Loew's held by you and Mr. Mayer and Mr. Thalberg at any time between 1927 and 1932 was, in percentage? A. Not to exceed one per cent.

2184

Q. And as to M-G-M, what if any was your holding? A. We didn't have very much. Metro-Goldwyn Pictures had a preferred stock in which I had a few shares. Its common stock was all owned by Loew's Incorporated, every share.

Q. That has been testified to. Let me ask you this. Did you or any one of you three or all three together have a controlling interest in any corporation that is here a defendant, or any subsidiary or affiliate of any defendant? A. No, we did not.

Q. Would you care to state who the largest stockholders in, say, 1932 and 1933, in Loew's were? A. The largest stockholders in 1932 were the Film Securities Corporation which is the corporation which was organized at the re-

J. Robert Rubin—for Defendants—Direct

quest of the Government pursuant to a consent decree which was entered into between Fox and the Government, by the terms of which all of that stock the Fox Film Corporation owned in Loew's, 660,000 shares, were transferred to the Fox trustees. Those trustees were Thomas Perkins of Boston, Thomas G. Gregory, former Attorney General of the United States, from Texas, and Judge Hazel, John R. Hazel. They were the trustees who voted those shares. That 660,000 shares was approximately 43 per cent of all the stock of Loew's.

2185

I might say that that group was dominated by Chase National Bank and by Winthrop Aldrich personally; they were the dominating interest in the control of that stock.

2186

Q. Does this memorandum refresh your recollection as to the persons for whom this stock was held towards the end of the year 1932 (handing paper to the witness)? A. Yes.

Q. Will you state who they were? A. Weco Corporation, which is the Western Electric Corporation; Graybar Electric Corporation, which is also Western Electric; the Chase National Bank; Bancamerica Blair Corporation; Interstate Equities Corporation; Haystone Securities Corporation; the First of Boston Corporation; Securities Allied Corporation; Dillon, Read & Co.; Commercial Investment Trust Incorporated; United States and Foreign Securities Corporation; United States and International Securities Corporation; Chemical Bank and Trust Company; Manufacturers and Traders Trust Company; Manufacturers Trust Company; New York Trust Company, and The Philadelphia National Bank. These people had control of this stock because they were the owners of \$20,000,000 of notes to which this stock was collateral and when the notes failed to be paid they took over the stock.

2187

Q. By this stock you mean the 660,000 shares? A. 660,000 shares of Loew's Incorporated stock.

J. Robert Rubin—for Defendants—Direct.

Mr. Pollak: If your Honor please, I have here a copy of the directors' resolution relating to the contract that was in effect in the year 1930.

Q. You have testified that was the extension voted in the year 1930? A. The extension was voted on in May, 1930, and that extended it from 1932 to 1937, April 7th.

Mr. Driscoll: I just don't know what it all means until I have an opportunity to examine the contract. I reserve any objection to it at this time, the same as in the case of the contract.

Mr. Pollak: That is agreeable. I take it that there is no objection on the ground that it is only a copy and not attested?

Mr. Driscoll: No.

(The paper just offered was received in evidence and marked Defendants' Exhibit 34, of this date.)

Q. Mr. Rubin, testimony has been received in this case to the effect that in the year 1932 the sum of \$85,000 was paid for the motion picture rights to *Reunion in Vienna*. Did you have anything to do with that? A. I purchased it.

Q. And that is the correct figure? A. That is correct.

Q. Will you state in general terms, Mr. Rubin, what the character of the play, *Reunion in Vienna*, was?

Mr. Driscoll: I can't see that we are trying that question.

The Special Master: What has that to do with it?

Mr. Pollak: A point has been made by Mr. Driscoll that large sums were paid for particular plays, for the motion picture rights in them, and one of them is this play, *Reunion in Vienna*. That has so far been the subject of testimony. In connec-

Colloquy of Counsel.

tion with our contention that the figure of \$30,000, 2191
 which is the figure that Mrs. Barnes testified she
 was anxious to get, is a reasonable figure for motion
 picture rights in "Lefty Lynton" and is the measure
 of plaintiffs' recovery; I want to show and want to
 explain the circumstances obtaining on the higher
 prices of certain other motion picture rights in 1932,
 and the ones that I am mentioning, by the way, are
 among the very highest payments made in 1932.

Mr. Driscoll: Your Honor will recall that a 2192
 schedule of such payments was received in evidence.
 It seems to me that Mrs. Pollak's statement is a fair
 exposition as to why that is absolutely beside the
 point and why it should not be gone into. We are
 not trying Reunion in Vienna. On cross examination
 of some witnesses that he produced we asked in
 regard to some plays that were purchased at high
 prices. If he is going into each play, we are going
 to be some time.

The Special Master: I think we have had enough
 on those subjects. I remember Mr. Driscoll's men-
 tioning a number of plays that had been purchased
 at large prices. I don't think that the evidence is
 very material one way or the other myself.

Mr. Pollak: May I shorten it and preserve our 2193
 rights, if your Honor please, by just making an
 offer of proof that this witness would testify as
 to the \$85,000 payment for Reunion in Vienna in
 1932 and as to the \$100,000 payment for Good Earth
 in 1932; as to the \$80,000 payment plus a royalty
 for Barretts of Wimpole Street in 1932; that he
 negotiated these transactions, and that all of these
 purchases were of the motion picture rights of plays
 that had been outstanding Broadway successes,
 shortly theretofore and purchases that carried the
 right to use the name of these successes?

Colloquy of Counsel.

The Witness: There is only one correction; that Good Earth had not been a Broadway production. I purchased it on the strength of its tremendous success as a book!

Mr. Pollak: Would there be any objection to having that in the record, subject to any objection?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues being tried here. We are here on an accounting proceeding as to the profits made on "Letty Lynton", not on the profits made on Good Earth or anything else.

The Special Master: I think you have got plenty of testimony in support of your theory with reference to this \$30,000, including Mrs. Barnes. I don't see why it makes any difference if you paid \$100,000 for one play and \$200,000 for another play.

Mr. Driscoll: I object to it.

Mr. Pollak: I am satisfied. I would like to explain a point of fact. The evidence has disclosed that in addition to the \$80,000 paid outright for the Barretts of Wimpole Street there was a royalty promised. I don't think the evidence has so far shown what that royalty amounted to or what it came to. That is somewhat different, if your Honor please; that is supplementing the showing of fact.

The Special Master: I don't think that any of that has anything to do with this case. I promise you I don't. I think you have got the testimony in reference to these negotiations; whether it is material or controlling or not remains to be seen, but I think you have this testimony with reference to this \$30,000 and that is the main point you want to make. I don't see what difference it makes whether you paid \$80,000 for Barretts of Wimpole Street or not.

Mr. Pollak: I withdraw that. I do not take an objection.

J. Robert Rubin—for Defendants—Cross.

Mr. Driscoll: You mean you do not take an exception. 2197

By Mr. Pollak:

Q. Mr. Rubin, what, if anything, did you have to do in 1932 with shorts? A. Nothing.

Q. Or with foreign versions? A. 1932; nothing.

Q. How as to the other two principal executives? A. Nothing.

Mr. Pollak: That is all. Mr. Driscoll, you may cross examine.

2198

Cross examination by Mr. Driscoll:

Q. Now, to get this corporate set-up, Mr. Rubin, in 1932 Loew's Incorporated owned 100 per cent. of the stock of M-G-M Incorporated? A. That is right.

Q. Now, Loew's Incorporated is still in existence and functioning?

Mr. Pollak: The common stock.

A. He is talking about M-G-M Incorporated, that was an intermediate corporation.

Q. Is M-G-M Incorporated in existence now? A. No. 2199

Q. When was that dissolved? A. In this last year.

Q. M-G-M Incorporated in turn owned— A. All of the common capital stock of Metro-Goldwyn Pictures Corporation.

Q. Now, Metro-Goldwyn Pictures Corporation, is that in existence now? A. No, that has been merged.

Q. When was that merged? A. This last year.

Q. Into what was it merged? A. Into Loew's. I can say to you the plan was to merge all of the subsidiaries we could into Loew's.

J. Robert Rubin—for Defendants—Cross.

2200

Q. And Metro-Goldwyn Pictures Corporation in turn owned the stock of Metro-Goldwyn-Mayer Distributing Corporation? A. I think they did; I am not sure about that, Mr. Driscoll.

Q. Is Metro-Goldwyn-Mayer Distributing Corporation in existence now? A. No, that is out of existence.

Q. That has been merged into Loew's? A. Yes.

Q. And Metro-Goldwyn Pictures Corporation also owned Metro-Goldwyn-Mayer Corporation, the producer? A. Yes, that was a producing subsidiary, and still is in existence.

Q. Culver Export was also owned by Metro-Goldwyn Pictures Corporation? A. I think so; I won't swear to it.

2201

Q. Is Culver Export Corporation still in existence? A. No; that was merged into Loew's.

Q. At the same time as the others? A. Yes.

Q. Culver Export Corporation in turn owned 100 per cent. of a number of subsidiaries used in foreign distribution?

A. It owned 100 per cent. of some and owned less than 100 per cent. of others. I am not sure that Culver owned all of the stock of those local distributors.

By Mr. Pollak:

Q. That has been testified to; as to Sweden it did not; that has all been put in a schedule. A. I am not sure.

2202

By Mr. Driscoll:

Q. You say Culver has been merged into Loew's? A. Yes.

Q. Have these foreign subsidiaries, owned 100 per cent., merged into Loew's? A. None of the foreign subsidiaries.

Q. They are owned in the same relationship by Loew's as they were by Culver? A. I am not able to testify as to that.

Q. So that all these main corporations—when I say main

J. Robert Rubin—for Defendants—Re-direct.

corporations I mean Loew's Incorporated, M-G-M Incorporated, Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Corporation, Culver Export Corporation—they are all merged into Loew's, with the exception of Metro-Goldwyn-Mayer Corporation, the producer, is that correct?
A. Yes.

2203

Q. Now, then, as to the subsidiaries that operate the various theatres theretofore— A. They are still in existence.

Q. —they have not been merged into Loew's? A. No, neither the theatre subsidiaries nor the distributors throughout the rest of the world have been merged. They are still in existence.

2204

Mr. Driscoll: That is all.

Mr. Pollak: That is all, Mr. Rubin. I have nothing more.

The Special Master: Are you finished for today?

Mr. Pollak: I think Mr. Mills has one schedule.

There is one more matter Mr. Cohen has reminded me of.

Re-direct examination by Mr. Pollak:

Q. Mr. Rubin, the evidence has disclosed that the production cost was distributed 25 per cent. to Culver and 75 per cent to Metro-Goldwyn Pictures. Who set that percentage arrangement? A. I think I did.

2205

Q. Was that division made in your best judgment? A. I thought that was what we should charge at that time.

Q. The decision was made on or before 1932? A. I won't say I did it alone, but it was done by those of us in charge. We determined that would be an appropriate percentage.

Q. In 1932 or theretofore? A. It was before that. I might say we have changed it since.

J. Robert Rubin—for Defendants—Re-cross.

2206

Q. The evidence has disclosed that income was divided 80 per cent. to the Pictures Corporation and 20 per cent. to the Distributing Corporation. How was that division made? A. Probably Mr. Mills and I worked that out, on the theory that that was what it cost for distribution; we allowed the distributing company 20 per cent.

Q. That was your best judgment? A. That is right; that is what we thought was equitable and fair.

Q. That was long before 1932? A. That was long before 1932.

2207

Q. The evidence also disclosed that the home office expenses were divided exactly or roughly 30 per cent. to the Pictures Corporation and 70 per cent. to the Distributing Corporation; who made that division? A. I don't recall whether I did that or not.

Q. Were you familiar with it? A. Yes, I was familiar with it; it was done long before 1932.

Q. Was that division made, if you know, in the best judgment of the executives? A. I know I approved of it.

Q. It was in existence in 1932? A. Yes.

Q. And theretofore? A. Yes.

Mr. Pollak: I think that is all. I want Mr. Mills for a moment.

2208

Re-cross examination by Mr. Driscoll:

Q. You said that the division between foreign and domestic companies has been changed? A. Yes, this week.

Q. What is the change? A. 70 per cent. and 30 per cent.; the foreign business has improved considerably.

JESSE T. MILLS, recalled

2209

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, you remember at the last hearing you were asked to find out whether there were any losses on American pictures distributed abroad in the season of 1933 by any of the Culver subsidiaries? Do you remember that; yes or no? A. Distributed abroad?

Q. Distributed abroad, yes. I am referring to American pictures other than your own, of course. You remember you were asked to look that up? A. Yes.

Q. Have you found any such loss? A. Only one.

Q. What was that? A. \$2,269.

Q. In what country? A. South Africa.

2210

Q. You have already testified that there were other losses occasioned by the enforced distribution of non-American pictures in certain foreign countries? A. Yes.

Q. Mr. Mills, am I right in this, that the only loss on any American picture, other than one of your own productions, distributed in the year 1933, was a loss of less than \$3,000 in South Africa? A. That is right.

Q. Mr. Mills, have you prepared a schedule showing the relative success or non-success of pictures released in the year 1932, having in the one hand stars and in the other hand not having stars; yes or no; have you such a schedule? A. Yes.

2211

Q. Was that schedule correctly prepared? A. Yes.

Q. Under your supervision? A. Right.

Q. Have you a copy of it for Mr. Driscoll? A. I have not with me, no. There is only one copy. (Pencil schedule produced.)

Mr. Pollak: I will offer this.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues we are trying here before the Special Master.

Jesse T. Mills—for Defendants—Recalled—Direct.

2212

Mr. Pollak: I ask to have it marked for identification.

(The paper just offered was marked Defendants Exhibit 35 for Identification, of this date.)

Q. Referring to Defendants' Exhibit 35 for Identification, that classifies the pictures released in 1933 in three groups, does it not (handing paper to the witness)? A. I will have to refresh my recollection on it. We have summarized this in two groups.

2213

Q. Which are the two groups? A. For the fiscal year 1932, the two groups consist of 28 pictures in which there were stars and 13 pictures in which there were no outstanding stars.

Q. What were the average profits on the feature pictures containing stars?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial and not within the issues being tried in this accounting proceeding.

The Special Master: Put it in for the purpose of identification, and an exception to you in refusing to take any further evidence.

2214

Mr. Pollak: That is all. I want an exception noted. I now offer it in evidence.

The Special Master: It is excluded, with an exception to you.

Mr. Pollak: In Exhibit 18-E-1, the item "New York Expense in Connection with Production" which appears as \$149,520.31, should be \$151,125.59 as detailed on Defendants' Exhibit 11.

This closes the defendants' evidence, if your Honor please. As we made clear to your Honor at the time of the submission of briefs, we might have, of course, further findings to submit to your Honor.

Testimony of Rubin, Read into the Record—for the Defs.

and we may have and probably shall have memoranda on points of fact or law to submit to your Honor. One memorandum that I have in mind and that is substantially complete now, is a memorandum listing the points in the picture that demonstrably were not taken from the play and also listing the points in the play that demonstrably were based on matters in the public domain. These analyses are based, as your Honor will recall, upon the statements of Judge Hand in his opinion that much of the picture owes nothing to the play, and again, that a considerable part of the play—I think are Judge Hand's words in the record—was based upon incidents in the public domain. I will have that document certainly by next week and I will send a copy of it to Mr. Driscoll at the Coast and one to Mr. Charke here because they might reply to it.

The Special Master: This is the end of the testimony?

Mr. Pollak: This is the end of the testimony.

Mr. Driscoll: I want to offer in evidence the following from Mr. Rubin's testimony in the trial before Judge Woolsey (P.P.R. at fol. 66):

(The testimony of Rubin was designated Reference No. 18.)

The Special Master: Are you going to read it?

Mr. Driscoll: Yes. "I was acting as counsel for Metro during 1930 and 1931. When I say 'Metro' I mean the general Metro interests. I was during that period of time an officer of those corporations with authority to act for those corporations."

I am reading from folio 67: "There was a manuscript of the play submitted about that time to me on behalf of the defendant Metro-Goldwyn-Mayer

Max Prager—for Plaintiffs—Direct.

2218

Corporation; that is the producing corporation, and any manuscript that is given is for the purpose of providing information for that corporation, and at the same time it was for the purpose of producing a picture that might be distributed by Metro-Goldwyn-Mayer Distributing Corporation or shown in the Loew theatres, and might also be exported by the Culver Export Company. Really what I do when I am looking over manuscripts is looking after the interests of all the defendant corporations."

2219

I want to read from folio 85: "All these corporations are working together as one. They work together in harmony and work together on the promotion and production and distribution of a picture like 'Letty Lynton,' very likely."

Then I want to call Mr. Prager to explain or analyze these four schedules put in last week, prepared by Mr. Craig.

The Special Master: That is, referring to Exhibit C-30.

MAX PRAGER called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

2220

Direct examination by Mr. Driscoll:

Q. You have given your name, Mr. Prager? A. Yes.

Q. And your residence? A. 924 East 10th Street, Brooklyn.

Q. What is your business, Mr. Prager? A. Practicing certified public accountant.

Q. You have been associated with the attorneys for the complainants in this matter? A. Yes.

Q. Have you at my request looked over the papers that

Mrs. Prager—for Plaintiffs—Direct.

have been offered in evidence marked Defendants' Exhibit C-30? A. Yes, sir. 2221

Q. I think the four of them are marked under the one mark, Defendants' Exhibit C-30. I show you schedule No. 1 of Exhibit C-30, and ask you if you have examined that schedule (handing paper to the witness)? A. I have.

Q. That schedule purports to cover the days and hours consumed, under five different headings, does it not? A. Yes.

Q. That is, days and hours chargeable to the various headings? A. Yes.

Q. Those are feature pictures, 1327 days; feature Cosmopolitan, 33 days; feature retakes Cosmopolitan, 255 hours; feature retakes Cosmopolitan, 24½ hours; and 5, two shorts, estimated at two days each, four days? A. Yes. 2222

Q. Now, Mrs. Prager, that then starts with the number of days, 1364, and attempts then, does it not, to reduce the 299½ hours to days at the rate of eight hours a day? A. Yes.

Q. Adding 37 days to the 1,364 days in the first column? A. That is right.

Q. Making a total of 1,401 days? A. Yes.

Q. On one of the schedules submitted in evidence at the Coast "Letty Lynton" was listed as 33 shooting days? A. Yes.

Q. This schedule then compares the 33 shooting days to the 1,401 days which presumably is the number of shooting days for all of the business at the studio within the fiscal year, is that correct? A. That is right. 2223

Q. And finds a percentage of .0235? A. That is right.

Q. Which presumably is supposed to represent the proportion of total shooting days in the studio taken up by "Letty Lynton"? A. That is right.

Q. On that schedule, Mr. Prager, they have rates and amounts footing up to \$2,153,868. Those figures have nothing whatever to do in arriving at this .0235, have they?

2224

Mr. Pollak: I don't think Mr. Prager can testify to that. I object to his testifying. The document is an exhibit prepared by Mr. Craig and received in evidence. If it does not seem to be the fact, if the mathematics of that exhibit are unconvincing or it is logical, that is a matter of internal evidence from the document itself. Mr. Prager has had nothing to do with its preparation.

2225

Mr. Driscoll: It is quite evident that Mr. Pollak does not understand the exhibit at all. If he had given any study to the exhibit it would become clear to him that the \$2,153,000 and the items going to make that up have nothing whatever to do with his arriving at the .0235. .0235 is simply arrived at by taking the total shooting days of 1,401 and comparing 33 days to 1,401.

Mr. Pollak: As a matter of fact, that is true enough.

Mr. Driscoll: That is the point I want on the records. Even Mr. Pollak sees that now. The \$2,153,000 have nothing whatever to do with arriving at the .0235.

2226

Mr. Pollak: It is perfectly obvious that .0235 represents the ratio of 33 to 1,401; that is obvious from the exhibit. It is not a matter to be testified to by Mr. Prager.

Mr. Driscoll: Very well.

Q. Mr. Prager, as an accountant would you say that the \$2,135,868 has anything to do with arriving at .0235? A. The financial figures have absolutely nothing to do with the derivation of this ratio of .1235.

Mr. Driscoll: That is what I wanted to know.

Mr. Pollak: That is conceded, that that represents the ratio between those figures.

Mr. Prager—for Plaintiffs—Direct.

Mr. Driscoll: Let us have it on the record that 2227
Mr. Pollak conceded this.

Mr. Pollak: That is just what I did concede—
the ratio between 33 and 1,404.

Q. Mr. Prager, item No. 1 on this exhibit, feature pictures, has a rate of \$1,559 per day? A. That is right.

Q. Item 2 has a rate of \$1,250 per day? A. That is right.

Q. Item No. 3 has a rate of \$125 per hour? Is that true? A. That is right.

Q. Or \$1,000 a day of eight hours? A. Yes; eight hours.

Q. Item 4 has a rate of \$100 per hour? A. Yes.

Q. And the two shorts have a rate of \$1,750 a day for each short? A. Yes. 2228

Q. I presume from this statement that \$1,559 is the cost per day estimated by the studio? A. Yes.

Q. If that is so, then items 2, 3 and 4 and 5 are all in below cost on that statement? A. Yes.

Q. All of them? A. They are in below cost if we take item No. 1 as the basis of cost.

Q. If you take— A. As the true basis of cost for a camera shooting day.

Q. So far as these computations are made, "Lettie Lynton" is on the basis of \$1,559 per day? A. That is right.

Q. And all of these others are below that? A. Yes, that is right. 2229

Q. Will you turn to Schedule No. 2 of that same exhibit? Is it not true as a matter of accountancy or mathematics or whatever Mr. Pollak would have us call it that the rates there set forth and the amount of money charged against each picture likewise have nothing whatever to do with the percentage of .0239 arrived at as the ratio between 33 and 1,381? A. Well, this schedule, the second schedule is on a somewhat different basis from the first.

Q. What is the difference between the first and second

Mr. Prager—for Plaintiffs—Direct.

2230 schedules, Mr. Prager? A. In the first schedule items 2 to 5 inclusive have, I presume, the precise time it took to produce each of these products.

Q. That is the shooting time that was charged against each one of those items— A. —is a definite amount, ascertained. The same items on the second schedule, 2 to 5 inclusive, while in the upper part of the schedule the precise amount of time consumed by each is stated, yet in the lower part of the schedule instead of showing the precise amount of time it is derived by finding the amount of overhead charged to 2 and 5 inclusive and dividing it by a theoretical rate of \$1.559 per camera shooting day, thereby deriving a smaller number of days and hours than would otherwise seem to be the case.

2231 Q. In other words, Schedule 1 presumes to set forth the exact shooting time charged against items 2 to 5? A. Yes, sir.

Q. Schedule 2 endeavors to change that shooting time to a theoretical smaller figure? A. That is right.

Q. Would you say that theoretical smaller figure goes to ascertain the ratio of .0239? A. That is right.

Mr. Pollak: Your Honor, of course, understands that the point of these schedules was to give every possible basis of computation of overhead. The difference between Schedules 1 and 2 is, as I read them, .0004; isn't that right?

2232 The Witness: The difference is the difference between .0235 and .0239.

Mr. Pollak: Am I right in saying that the difference is .0004?

The Witness: Yes.

Mr. Pollak: May I interrupt your question by one question on cross-examination? I ask if the difference between the two is 4-10,000ths, yes or no?

The Witness: Yes.

Mar. Prager—for Plaintiffs—Direct.

Q. Now, in Schedule No. 1 of this Exhibit C-30, Mr. 2233
Prager, they take a base on a total shooting day production for the entire studio, 1,401 days? A. That is right.

Q. In Schedule 2 of this fictitious computation they succeed in reducing that to 1,381 days, is that correct? A.
Yes.

Mr. Pollak: I take it that if I fail to object to such characterizations as "fictitious" your Honor will not regard me as conceding to any such designation.

The Special Master: Certainly.

Q. The fewer the days the higher the rate, isn't that true? A. That is true, the other figures remaining the same. 2234

Q. In other words, if "Letty Lynton" is charged with 33 shooting days and that remains in each computation, then the smaller the days the higher the rate? A. That is right.

Q. On this exhibit schedule 2, again as in the case of schedule No. 1, the rate set forth and the amount set forth have nothing whatever to do in arriving at the percentage of .0239? A. In this Schedule No. 2, Mr. Driscoll, it is to the extent of fixing the 1,381 days.

Q. Will you explain to what extent it is? 2235

The Special Master: He has already explained that.

Q. Mr. Prager, I will ask you to look at Exhibit C-23. What is that schedule, so that the Master may know (handing paper to the witness)? A. It is headed, "Statement showing production costs accrued on features during fiscal year 1932 and percentage of completed costs and shooting time."

Mr. Prager—for Plaintiffs—Direct.

36 Q. On that schedule the defendants purport to give, do they not, the amount of money for labor and material spent on that picture during the fiscal year in question? A. It includes labor and material, departmental overhead and general overhead.

Mr. Pollak: Pardon me; on that exhibit I don't find general studio overhead included there, Mr. Prager.

Mr. Driscoll: I think that was testified to by Mr. Craig out on the Coast.

Mr. Pollak: That that exhibit included general studio overhead?

37 Mr. Driscoll: Let us read Mr. Craig's testimony, page 550 (reading):

"Question. You have on your schedule C-25 a total production cost for the fiscal year of 1932 of \$16,204,197.54. In that you have charges for overhead, studio overhead against each picture on the basis of camera shooting days?

"Answer. That is correct.

"Question. Now, turning to the amended accounting, Mr. Craig, you have this overhead item of \$2,246,793.28. How much of that \$2,246,793.28 is in this \$16,204,197.54?

38 "Answer. There was absorbed in the—let's see now—perhaps you had better read the question so that I will be sure.

"(The question was read by the reporter.)

"Answer. \$2,153,868."

The Special Master: The studio overhead is not in this thing. This is \$14,991,351.56.

Mr. Driscoll: That \$14,000,000 is part of the \$16,000,000; that is the \$14,000,000 plus the \$2,000,000.

The Special Master: You are not referring to this exhibit now?

Max Prager—for Plaintiffs—Direct:

Mr. Driscoll: No, I am reading from Craig's testimony. 2239

Mr. Pollak: He is referring to this exhibit.

The Special Master: You are not referring to page 3 of Exhibit C-30?

Mr. Driscoll: No, the question refers to Exhibit C-25.

The Special Master: I thought you were referring to the third page of Exhibit C-30.

Mr. Driscoll: No; I am referring to Craig's testimony in regard to C-25; I read from pages 550 to 551.

The Special Master: On page 3 of this Exhibit C-30 it says, "Total cost of feature pictures during fiscal year 1932, per Exhibit C-25 in studio hearing, \$14,991,315.56." 2240

Mr. Driscoll: Yes, that is the exhibit; I have not come to that yet. Before I come to that I want to point out this:

Q. In C-25, where they take their footings, whether you regard it as \$14,991,000 or \$16,204,000, seven different productions have substantial charges against them but have no shooting days whatever against them (handing paper to the witness)? A. That is correct.

Q. If those seven different productions had camera days assigned to them that would decrease the ratio charged to Letty Lynton? A. That is right. 2241

Q. Those seven different productions have a total charge of a million dollars? A. That is right, approximately so.

Q. Now, will you kindly turn to schedule 3 of Exhibit C-30 (handing paper to the witness)? Mr. Prager, will you in your own words kindly explain that exhibit to us?

A. This schedule No. 3 is headed, "Percentage of overhead chargeable to Letty Lynton on basis of direct production costs of feature pictures." It starts out with a figure of

Mr. Prager—for Plaintiffs—Direct.

2242 \$14,991,315.56, which is what you would call a subtotal of Exhibit C-25.

Q. That is the same figure that appears on the second page of Exhibit C-25, entitled, "Total features in process during year"; is that right? A. That is right.

Q. Go ahead. A. To which are added certain credits or red ink figures appearing on Exhibit C-25, together with a small adjustment of \$52.75, making a total adjusted figure of \$15,038,614.09, from which is deducted \$3,678,758.93, purporting to represent the studio overhead deducted on the same basis as set forth in complainant's memorandum, pages 7 to 11 inclusive, except total elimination of publicity charges explained below, giving a net figure of \$11,359,855.16, which presumably represents nothing more than labor and materials with all overhead excluded.

There is contrasted with that total the labor and material costs of Letty Lynton as set forth in complainants' memorandum on page 11 of \$238,649.30, from which is deducted \$3,179.64, an elimination of publicity charges included in the previous figure.

This, according to Schedule No. 3, brings the labor and material cost of Letty Lynton down to \$235,469.66.

Now, the ratio of labor and material costs of Letty Lynton to the total for the fiscal year 1932 of \$11,359,855.16, is .02073.

2244 Q. Now, Mr. Prager, that Exhibit purports to question our computation made on page 12 of our memorandum? A. That is right.

Q. In our computation we took a labor and material figure for Letty Lynton of \$262,000 plus? A. That is right.

Q. This exhibit takes a labor and material figure of \$235,000 plus? A. That is right.

Q. Can you tell us where the difference lies? A. In our computation we used the defendants' figure of labor and material and departmental overhead as set forth in their Exhibit 18-D-5 of \$262,682.69.

Max Prager—for Plaintiffs—Direct.

Q. That is the figure given in their Exhibit 18-D-5? A. 2245
That is correct.

Q. How did they reduce that down, if you know, to \$235,000 plus? A. They start with our figure of \$238,649.30, as set forth in complainants' memorandum, page 11, from which they take a deduction of \$3,179.64, which, according to the footnote on this schedule is as follows:

"Complainant's Memorandum objects to Publicity Charges, but leaves in picture Letty Lynton a charge based on .018% of total Publicity Charges for year. We claim basis of .018% is incorrect and to arrive at proper basis eliminate all Publicity Charges to arrive at percentage of overhead per complainant's own basis."

Q. So that they reduce our figure of \$262,000 taken from their exhibit 18-D-5, to \$235,000, by purporting to eliminate the publicity charges? A. That is right. 2246

Q. In arriving at their percentage here have they included in their figures the various expenditures appearing in Exhibit C-25, second page, of cost of suspense productions, \$308,000 plus, cost of pictures completed in prior years, \$59,000 plus? A. No, they have not.

Q. Cost of shorts, \$110,000 plus? A. No.

Q. They did include two items of shorts of \$7,000 each, didn't they? A. That is \$7,000 overhead included in the cost of shorts.

Q. So that it would make a difference of half a million dollars in their basis figures if they included those expenditures? A. That is correct. 2247

Q. And those are not included? A. That is right.

Q. Will you look at Defendants' Exhibit 30, page 4 (handing paper to the witness)? How does that differ in its method of bringing out the correct ratio, as they call it, 0213, from Schedule No. 3? A. Schedule No. 4 starts—

The Special Master: Isn't it self-explanatory?

Mr. Driscoll: Maybe it is.

Joseph R. Vogel—for Defendants—Direct.

2248

The Special Master: It seems so to me.

Mr. Driscoll: If the Master understands it, the rest of us can pass it. All right, you may examine Mr. Prager.

Mr. Pollak: I don't think I want to examine Mr. Prager. I will say this, that he—

The Special Master: On or off the record?

Mr. Pollak: On the record. These documents having been compiled by Mr. Craig—

Mr. Pollak: Yes, I don't think I want to examine Mr. Prager.

Mr. Driscoll: We rest. It is understood that is all the testimony.

2249

Mr. Pollak: I told you that I have not absolutely foregone the opportunity to call Mr. Craig. I don't think I can renounce it for him, or forego it.

The Special Master: I don't think Mr. Prager's testimony has led us into anything new in this case.

The Special Master: Have you any other testimony?

Mr. Pollak: Other than possible rebuttal.

HEARING OF MARCH 16, 1938.

2250

JOSEPH R. VOGEL, of 381 Park Avenue, New York, N. Y., called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Vogel, would you state in your own way what your functions are in connection with the Loew theatres?

A. I am the operator of all Loew theatres outside of New York City and in New York City at the Capitol, the Astor, the Paradise and the Valencia theatres.

Joseph R. Vogel—for Defendants—Direct.

Q. By the way, how long have you been with Loew's theatres? A. Twenty-nine years. 2251

Q. Is this a fair general statement, that in conjunction with Mr. Moskowitz you are in general charge of the construction and operation of the theatres? A. Yes, sir.

Q. Of the Loew's circuit. Now, Mr. Vogel, are you also familiar with the costs of construction, in a general way? A. Yes, sir.

Q. And of operation? A. Yes.

Q. And of the methods of computing overhead in connection with the theatres? A. Yes, sir.

Q. Am I right in this, that in the acquisition of land for a theatre it is frequently as a practical matter impossible to use every inch of space simply for a theatre? A. You are right. 2252

Q. Would you explain to the Master, if necessary drawing little diagrams, why that is so, Mr. Vogel? A. After deciding to build a theatre in any particular zone, the first thing done is to try to find the proper location. By the proper location I mean the location where a great majority of the people in the town pass some time during the day. Also, in a town where parking conditions are very bad, we have to figure on the possibilities of rear parking.

When we finally decide on a location, we then try to assemble the piece of property large enough to build a theatre which we think is the proper size theatre. An entrance to a theatre is somewhere between twenty and thirty feet. The entrance is called a lobby. It is practically impossible to buy twenty or thirty feet of frontage and then buy sufficient ground in the rear to build a theatre. 2253

Q. What is that? A. In many instances more than one owner has the piece of property adjoining the theatre. You have to make a deal with three or four owners of various pieces of property. The property itself in the rear is large enough for the theatre, and the front is too large for a lobby.

Joseph R. Vogel—for Defendants—Direct.

2254 Q. By twenty or thirty feet did you mean width or depth? A. Width.

Q. Am I right in this, that when you buy a plot the seller in many instances insists on selling the whole plot?

A. Very definitely; he won't sell a piece of it because he can't improve it at a later date.

Q. In other words, if you look for the plot that you exactly need for the theatre, you just couldn't get the plot?

A. Almost impossible.

Q. So that when you build on such property there is actually some excess property? A. Most always. That is easily understood. The lobby is at the end of the theatre; the theatre is generally back. You must have an entrance to the theatre and you must have some property left over almost always.

Q. In other words, the area necessarily used in the back is larger than the area used in the front? A. Right.

Q. The acquisition of just the area necessary to use front and back would leave a front area high and dry? A. Unless we stupidly build the theatre back to the sidewalk and use the frontage purely for the theatre, instead of using the rear ground. In most instances you can just buy a piece of property just large enough to build a two thousand or three thousand seat theatre. The property is usually a little larger. You could build the theatre up to the front but we would just be wasting that frontage and getting no revenue for it at all.

Q. As a practical matter that is never done? A. Practically never.

Q. Am I right in this, Mr. Vogel, that the Loew theatres are not in the real estate business as such? A. Definitely no.

Q. The real estate activities they have are incidental to this use of the excess space? A. Yes.

Q. And solely so? A. Yes, sir.

Q. In the cases where you don't build a theatre, the

Joseph R. Vogel—for Defendants—Direct.

amount of excess space is necessarily determined by what you take over, that is correct, isn't it? A. Correct. 2257

Q. There is on your part no option in those cases? A. No option.

Q. I want to ask you to turn to an entirely different subject. You are familiar, are you not, Mr. Vogel, with the exhibition of films in the theatres? A. Yes.

Q. It is a fact, is it not, that in all exhibitions news reels or shorts or both of them are given along with the feature? A. Yes.

Q. That was a fact in 1932? A. Yes, sir.

Q. Universal, so far as you know, throughout the exhibition world, in the United States, anyway? A. Yes.

Q. Is it your opinion as a person familiar with exhibition that the news reels and shorts aided in the attractiveness of theatrical productions? 2258

—Mr. Driscoll: That is objected to as incompetent, irrelevant and immaterial; no basis laid.

The Special Master: There isn't much basis for it, I think.

Mr. Pollak: He has testified that he has had thirty years' experience.

Q. Do you constantly make contracts for the exhibition of films? A. Yes. 2259

Q. You deal with the managers of the individual theatres that take particular films for exhibition? A. I purchase the pictures for them.

Q. Do you receive representations as to the success or failure of different films in different theatres? A. From every theatre every week.

Q. And for how long roughly have you had this type of activity? A. Sixteen years.

Q. I now repeat the question.

Colloquy of Counsel.

2260

Mr. Driscoll: Same objection.

The Special Master: You are practically asking the witness, looking at an exhibit like Plaintiffs' Exhibit No. B, showing the weekly report of Loew's Astoria during the period during which "Letty Lynton" was exhibited there, whether in his opinion the shorts or extra "Down Memory Lane," News No. 44, was an added attraction to the theatre or not.

2261

Mr. Pollak: It is almost self-evident that it was, but I think it is desirable to have it in the record that it was. I think it is desirable to have the testimony of a witness who is familiar with it. I think it is desirable to have a record in a case of this importance.

The Special Master: Of course, as applied to any particular case he can't tell of his own knowledge that during that week the fact that they had those shorts there made any mathematical difference in the receipts of the theatre at the time that "Letty Lynton" was being played.

2262

Mr. Pollak: It is because he can't testify to a particular instance and because no human being can after a lapse of six years, that I am having him testify to the general fact. Also as to the case in each theatre. He has already testified that the practice was universal. I should like to supplement that by what is almost self-evident, that the universal practice had a foundation in practical business conditions.

The Special Master: You have got the testimony in that very time in those "B" exhibits, that there were shorts that ran along, or sometimes vaudeville—

Mr. Pollak: I will get to vaudeville in a moment.

The Special Master:—at the same time that

775
Joseph R. Vogel—for Defendants—Direct.

"Letty Lynton" was given, so you don't need any further testimony on that. 2263

Mr. Pollak: I think I would like to have his expert judgment on it.

The Special Master: Well, go ahead. Exception.

Q. (The pending question was read by the stenographer, as follows: "Is it your opinion as a person familiar with exhibition that the news reels and shorts aided in the attractiveness of theatrical productions?") A. Yes, sir.

Q. How with respect to vaudeville. Mr. Vogel: would your answer be the same? A. Yes, sir.

Q. Mr. Vogel, have you in your possession certain data bearing on the attractiveness of vaudeville as reflected in the motion picture business? Do you know of any facts bearing on it, just yes or no? I will reframe the question. As to vaudeville, Mr. Vogel, can you give specific illustrations of your conclusion that vaudeville added to the attractiveness of a motion picture production? 2264

The Special Master: Confine yourself to the theatres involved in this case and the evidence that is in already.

Mr. Pollak: Speaking of the Loew chain of theatres or a theatre.

The Special Master: With reference to the particular weeks that are in evidence, the testimony of which is in evidence. 2265

Q. Can you give an illustration as far back as 1932 of your particular chain?

The Special Master: We have in evidence full schedules of what happened while "Letty Lynton" was being exhibited, so the witness should confine himself to a designation of those exhibits, it seems to me, not just general testimony to the effect that

Joseph R. Vogel—for Defendants—Direct.

2266

vaudeville is a great thing and helps the receipts of the pictures. He should confine himself to these. They are all there if he wants to look at them.

Mr. Pollak: Yes, refresh your recollection. (Exhibits handed to the witness.)

The Special Master: What theatre do you want?

The Witness: Century Theatre, Baltimore; (examining exhibits) it didn't play the Century; it played the Stanley.

The Special Master: There is a memorandum of Mr. Driscoll's which purports to go into this subject.

Mr. Driscoll: Do you want a list of the vaudeville theatres?

2267

The Witness: I have one here, Penn Theatre, Pittsburgh (referring to Plaintiff's Exhibit D-20).

Q. Taking the Penn Theatre, Pittsburgh, Mr. Vogel, you wanted to give an illustration drawn from that; will you give it? A. The stage show here and the picture together resulted in a gross of \$16,000. This was as poor a year as we have had in show business. Pictures of the type of "Letty Lynton," in my judgment, would not have done \$10,000 without a stage show at that time. The vaudeville show made our theatre more popular. We gave at our theatre a vaudeville show when the other theatres throughout the city at that time ran straight picture show, so that the patrons of our theatre in addition to seeing "Letty Lynton" saw a vaudeville stage show, which they could not do at any other theatre in the town.

2268

Q. And substantially that would be true in other theatres in which you showed vaudeville? A. Yes, sir.

Q. Have you anything to add to this matter of vaudeville, Mr. Vogel, in your own way? A. To this particular week?

Q. Preferably that week? A. It is very hard for me.

Q. Is it your opinion, throughout the whole chain the receipts were increased by the fact that vaudeville was shown with the film? A. Definitely.

Joseph R. Vogel—for Defendants—Cross.

Cross examination by Mr. Driscoll;

2269

Q. At this particular time how many vaudeville theatres did you have out of the 101 Loew theatres? A. I don't remember.

Q. Was it 50 or 75 or 100, or was it 18? A. Closer to eighteen.

Q. Haven't you taken the trouble to see whether or not we were accurate in our statement to this Court that you were operating only eighteen vaudeville theatres at this time? A. I did not.

Q. Didn't Mr. Pollak ask you to check the assertion that you were operating only eighteen vaudeville theatres? A. He didn't mention the number of theatres.

2270

Q. Now, Mr. Vogel, aren't these the only theatres that were vaudeville theatres at that time: the Boulevard, the Pitkin, the Newark, the Metropolitan, the State, the Triborough, the Valencia, the Orpheum, the Rochester, the Gates, the Yonkers, the Boston, the Bay Ridge, the Jersey City, the Syracuse, the Paradise, the Penn Pittsburgh and the Fox Atlanta, aren't those the only theatres that were showing vaudeville at that time?

Mr. Pollak: The witness may refresh his recollection. He wouldn't know off hand.

2271

A. I think so; I am not positive.

Q. Do you know of any others? A. No. The Century, Baltimore, didn't show "Letty Lynton."

Q. I am taking into consideration only the 101 theatres that played "Letty Lynton."

The Special Master: And they played vaudeville at the time they played "Letty Lynton."

Mr. Driscoll: I wanted to know how many of the 101 played vaudeville; only eighteen played vaude-

Joseph R. Vogel—for Defendants—Cross.

ville; I didn't happen to include the theatre he mentioned:

Q. You spoke about vaudeville contributing to the attractiveness of the show; I think Walter put it to you and you said yes. How many vaudeville theatres does Loew run now? A. Three.

Q. It runs three now? A. Yes.

Q. It ran eighteen in 1932; five years prior to that it ran perhaps a hundred? A. Yes.

Q. So that vaudeville at this time was on its way out, in 1932? A. You couldn't get the attractions.

Q. Vaudeville was on its way out at this time, Mr. Vogel; that was my question. A. Yes.

Q. Let us take the Penn of Pittsburgh, that you spoke about on your direct examination. Have you the box office statement of that there before you?

The Special Master: D-20.

A. (Producing paper.) Yes, sir.

Q. You pointed out that the receipts there that week were \$16,000, did you not? A. Yes, sir.

Q. In that particular instance we have certain expenses that are definitely vaudeville expenses, haven't we? A. Yes.

Q. The first part of that would be an item of salaries for vaudeville, and in that particular case it was \$3,768; is that correct? A. No; less cost of the shorts, \$3,600.

Q. Then you had to have an orchestra when you had vaudeville, didn't you? A. Yes.

Q. In that particular case it was \$1,055? A. Yes.

Q. And you also had to have certain extra help when you had vaudeville? A. Yes.

Q. In this particular case you had a maintenance man; you didn't have him ordinarily, did you? A. Yes.

Joseph R. Vogel—for Defendants—Re-direct.

Q. Stage manager, you didn't have him when you didn't have vaudeville? A. Yes. 2275

Q. Property man, \$74.75? A. Yes.

Q. And carpenter? A. Yes, we have him.

Q. So that we have stage manager salary, we have property man salary, we have orchestra disbursement and we have vaudeville act salaries and so forth, and they all come to—how much would you say that was? A. The whole thing would be \$5,600.

Q. And your statement on direct examination was that the picture without vaudeville would not have drawn in more than \$10,000 instead of \$16,000? A. Yes.

Q. And your direct expense for vaudeville alone which you identify now is \$5,600? A. Yes. 2276

Q. So that there wasn't any profit whatever in the vaudeville? A. Very little.

Q. And that is true throughout the entire circuit of 18 theatres; there was practically no profit to vaudeville? A. No; in this particular instance that particular show had no drawing card so we didn't make any money.

Q. In other words, the extra expense you were put to by reason of your stage show ate up whatever additional money came into your theatre by reason of the vaudeville? A. Not all of it.

Q. It ate up one-third of the box office receipts for the direct expenses of the vaudeville? A. Yes. 2277

By Mr. Pollak:

Q. There were two or three matters mentioned by Mr. Driscoll. As to the fact that there are fewer vaudeville shows now; have you anything to say as to that? A. The radio and motion pictures have corralled all the attractions that formerly played at theatres, and those that we can get ask for so much money that it is impossible to make any money with it, so that at most of the theatres we have decided to eliminate vaudeville.

Letter, Dated April 11, 1938, Made Part of Record.

2278 By Mr. Driscoll:

Q. In other words, vaudeville doesn't pay? A. In a few spots, like the State Theatre.

Mr. Pollak: That is all.

Mr. Driscoll: The defendants rest again?

Mr. Pollak: We rest.

The Special Master: The record is permanently closed.

2279 Subsequent to this hearing and on or about April 11, 1938 Special Master Auchincloss received the following letter dated April 11, 1938 from Walter H. Pollock, Esq., Counsel for the defendants and in pursuance of the request contained in said letter directed the official stenographer to add this letter to the minutes:

COPY

COHEN, COLE, WEISS & WHARTON

61 Broadway

New York

11 April 1938

2280 Gordon Auchincloss, Esq.
50 Broadway
New York, N. Y.

Re Sheldon and Barnes v. Metro-Goldwyn
Pictures, et al.

Dear Mr. Auchincloss:

Following up Mr. Cohen's conversation with you of last Friday, I wish, on behalf of the defendant Loew's Incorporated and its subsidiaries, to call your attention to the

Letter, Dated April 11, 1938, Made Part of Record.

fact that on Exhibits L-6, L-8, L-9, L-10 and L-12 we have 2281
shown in the next to the last column on such Exhibits the
entire amount of the profit attributable to Loew's Incorporated for the period during which "Letty Lynton" with
other attractions was exhibited; and in the last column on
such Exhibits we have shown the $\frac{2}{3}$ rd's share of such profit
which according to our contention should be allocated to
"Letty Lynton."

Owing to the uncertainty as to the basis on which profits
would be allowed in the case of theatres, we omitted to
compute the amount of the federal income taxes which we
claim should be allowed based upon the amount ultimately
found to be due to the plaintiffs in the action.

The federal corporation income tax payable in respect 2282
to the year 1932 was 13 $\frac{3}{4}$ % and this percentage of the
final figures is the amount which we claim should be allowed
the defendant Loew's Incorporated in respect of this claim.

I respectfully suggest that for the completion of the
record the stenographer be requested to add this letter to
the record.

I am sending a copy of this letter to Mr. Driscoll.

Sincerely yours,

(Sgd.) WALTER H. POLLAK

WHIP/G

2283